Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*,*

Petitioners,

v.

LEGISLATURE OF THE STATE OF NEVADA, *et al.*,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In July 2003, the Nevada State Assembly voted on two tax bills that were deemed "passed" without the two-thirds vote required by the Nevada Constitution. The unconstitutional action was challenged in federal court by more than one third of the legislators in each house of the Nevada Legislature, individual citizens and taxpayers, and taxpayer and business associations. The following questions are presented by this petition:

1. Whether federal claims against a state legislature for unlawful vote dilution and nullification, arising under the Republican Guaranty, Due Process and Equal Protection Clauses of the United States Constitution, are insulated from federal court review merely because the state legislature's actions had been "authorized" by the state supreme court?
2. Whether the Ninth Circuit, in conflict with analogous decisions from the First and Seventh Circuits, erred in holding that a state legislature's adoption of a tax increase in conformity with the state constitution's two-thirds vote requirement rendered moot equitable claims arising under the federal Constitution challenging the legislature's actions deeming a prior tax bill as "passed" without the required two-thirds vote and seeking to prevent likely future action by the legislature in violation of the state constitution?
3. Whether the Ninth Circuit, in conflict with analogous decisions from several other circuits and contrary to this Court's precedents, erred in holding that there is a cognizable injury from unlawful vote dilution or nullification *only* when the vote dilution alters the outcome?
4. Whether the Ninth Circuit, in conflict with decisions of the D.C. Circuit, erroneously held that an altered legislative dynamic is not a cognizable injury?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, Members of the Nevada State Assembly; Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, and Hon. Maurice E. Washington, Members of the Nevada State Senate; Ira Victor Spinack, Eddie Floyd, Dolores Holets, Janine Hansen, Lynn Chapman, O.Q. Chris Johnson, Thomas Jefferson, David Schuman, Joel Hansen, Jonathan Hansen, Christopher Hansen, John Lusk, Ray Bacon, Greg White, Mary Lau, Larry Martin, Nanette Moffitt, Richard Ziser, Robert Larkin, Jill Dickman, Thomas Cox, Stan Paher and Judith Moss, taxpayers and citizens of, and voters in, the State of Nevada; Nevada Manufacturers Association, Inc.; Retail Association of Nevada; Nevadans for Tax Restraint; Nevada Concerned Citizens.

Nevada Manufacturers Association, Inc. and Retail Association of Nevada are non-profit trade associations incorporated in the State of Nevada, whose members are manufacturing and retail companies, respectively, doing business in the State of Nevada. Neither has a parent corporation. Neither has ever issued shares to the public. Nevadans for Tax Restraint and Nevada Concerned Citizens are unincorporated associations of Nevada taxpayers, citizens, and/or voters. The remaining Petitioners are all individuals.

Respondents: The Legislature of the State Of Nevada; The Senate of the State of Nevada; Hon. Lorraine T. Hunt, President of the Nevada Senate; The Assembly of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Jacqueline Sneddon, Chief Clerk of the Nevada Assembly; Diane Keetch, Assistant Chief Clerk of the Nevada Assembly; Brenda Erdoes, Legislative Counsel of the Nevada Legislature; Claire J. Clift, Secretary of the Nevada Senate; Hon. Kenny Guinn, Governor of the State of Nevada; Hon. Dean Heller, Secretary of State of the State of Nevada; Hon. Charles E. Chinnock, Executive Director, Nevada Department of Taxation.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Less then nine years ago, the voters of Nevada overwhelming amended their state constitution to prevent their Legislature from adopting bills increasing taxes without a two-thirds vote in each house. On July 13, 2003, the Nevada State Assembly violated that constitutional requirement, deeming a tax bill as "passed" without the requisite two-thirds vote. More than one-third of the legislators in each house of the Nevada Legislature, joined by individual citizens and taxpayers, taxpayer groups, and business groups, brought suit, claiming that the Assembly's action violated their constitutional rights by diluting their vote in violation

of the Equal Protection and Due Process clauses of the United States Constitution and by altering the structural mandates of the Nevada Constitution in violation of the federal constitutional guarantee of a republican form of government.

The Ninth Circuit Court of Appeals ultimately dismissed Petitioners' claims for declaratory and injunctive relief as moot, and dismissed their claim for nominal damages on the merits, holding that Petitioners failed to state a cognizable injury because the asserted vote dilution occurred over a bill—SB-6—that never became law. The Ninth Circuit's holding leaves in place an unconstitutional action by the Nevada Assembly that already altered and will continue to alter the legislative dynamic, and that called into question the ability of the people of Nevada to amend their own constitution. Important federal principals arising under the Republican Guaranty, Due Process, and Equal Protection clauses are at stake, warranting this Court's review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dismissing Petitioners' equitable claims as moot and Petitioners' legal claims for failure to state a claim, dated May 12, 2004, is available at 99 Fed. Appx. 90 and 188 Ed. Law Rep. 688, and is reproduced at pages 1a-5a of the appendix to this petition ("Pet. App."). The opinion of the Ninth Circuit denying Petitioners' emergency request for a preliminary injunction pending appeal, dated July 18, 2003, is reproduced at Pet. App. 6a. The opinion of the *en banc* United States District Court for the District of Nevada, dated July 18, 2003, dismissing Petitioners' complaint on *Rooker-Feldman* and other grounds is published at 274 F.Supp.2d 1152 and reproduced at Pet. App. 7a-14a. The minute order of the *en banc* District Court granting Petitioners' oral motion to enlarge the Temporary Restraining Order, dated July 16, 2003, is reproduced at Pet. App. 15a-17a. The order of

the *en banc* District Court granting Petitioners' request for a Temporary Restraining Order, dated July 14, 2003, is reproduced at Pet. App. 18a-19a. The opinion of the Ninth Circuit denying the petition for rehearing, dated June 22, 2004, is reproduced at Pet. App. 20a. There are no findings of fact, as no evidentiary hearing was held in this litigation or in the related state court mandamus proceeding in *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub nom., Angle v. Guinn*, 124 S.Ct. 1662 (March 22, 2004).

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals holding that Petitioners' equitable claims were moot and that Petitioners' legal claims failed to state a cognizable injury was entered on May 12, 2004. The court denied a petition for rehearing on June 22, 2004. A timely request for extension, filed on September 9, 2004, was granted by Justice O'Connor on September 13, 2004, extending the time in which to file this petition until October 20, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guaranty Clause of Article IV, Section 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, Section 18 of the Nevada Constitution, adopted by voter initiative in 1996, provides, in relevant part:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.
>
> 3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.

Article 9, Section 2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, Section 2 of the Nevada Constitution, adopted in 1864, provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year . . . .

Article 11, Section 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

STATEMENT OF THE CASE

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state constitution, which prohibited the Legislature from imposing new or increased taxes without the concurrence of two thirds of the members of each house of the Legislature. Nev. Const. art. 4 § 18(2). Tax measures that do not receive the necessary two-thirds vote may still be adopted, but must be submitted to the voters for approval before they can take effect. *Id.* § 18(3).

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn, one of the Respondents here, proposed to the Legislature a budget which included a $980 million tax increase, *Guinn II*, 76 P.3d, at 27, by far the most massive tax increase in the State's history. Unable to garner

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[1] Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections.

the two-thirds vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution. *Id.* Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a couple of education funding bills.

Because the Nevada Constitution mandates a balanced budget, and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature that was anywhere near the amount proposed was going to require a tax increase of somewhere between $800 and $900 million. The Legislature could not consider reductions elsewhere in the budget because the Governor's special session proclamation did not give the Legislature such authority, and the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved. *See* Nev. Const. art. 5, § 9 ("the Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened"); *Guinn II*, 76 P.3d, at 27. The Nevada Assembly was unable to muster a two-thirds vote for any of the tax increases that reached the Assembly floor, either during the 19th Special Session or the 20th, convened by the Governor on June 25, 2003, although it was widely believed that a smaller tax increase would receive the necessary two-thirds vote. *See Guinn II*, 76 P.3d, at 28 ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase").

Minutes after midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn sued the Nevada Legislature and every one of its members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase and thereby balance the budget and fund education by the means he had proposed but for which he had been unable to obtain the constitutionally-required level of support.

A group of legislators—some of the Petitioners here (the "Legislator Petitioners")—field a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could also consider reductions in the spending increases already approved. *Id.* On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "simple majority rule" rather than the two-thirds vote required by Article 4, Section 18(2) of the Nevada Constitution, unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation. *Id.*, 76 P.3d, at 34-35 (Maupin, J., dissenting). Although the court acknowledged the constitutional validity of the two-thirds vote provision of Article 4, Section 18(2), it found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. And although the two-thirds vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education." *Guinn I*, 71 P.3d, at 1272.

Three days later, on Sunday, July 13, 2003, the Nevada State Assembly conducted a floor vote on SB-6, a bill designed to impose a gross receipts tax on certain businesses in the State of Nevada. Pet. App. 9a. Although the vote in favor of the bill did not meet the requirements of the Nevada Constitution, the Speaker of the Assembly, Respondent Richard D. Perkins, nevertheless ruled that the bill had "passed." *Id.* A point of order by Petitioner Lynn Hettrick, the Assembly Minority Leader, was rejected by the Speaker, based on the writ of mandamus that had been issued by the Supreme Court of Nevada three days earlier.

As a result of the Assembly's actions, Petitioners were harmed in the exercise of rights protected by the Federal Constitution. Specifically, some of the Legislator Petitioners (15 members of the States Assembly who were among those voting against SB-6—a sufficient number to defeat the tax increase bill) had their legislative votes diluted—indeed, nullified—in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment when the bill was deemed "passed". All of the Legislator Petitioners suffered a cognizable harm due to the altered legislative dynamic brought about by the unlawful vote dilution. Other Petitioners (individual voters of the State of Nevada, some residing in the districts of the Legislator Petitioners) had their right to undiluted representation infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. Further, Petitioners had their right to a republican form of government infringed, in violation of the Republican Guaranty Clause of Article IV of the United States Constitution. This suit for nominal damages under 42 U.S.C. § 1983, costs and fees under 42 U.S.C. § 1988, and declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, followed.

On July 14, 2003, the United States District Court for the District of Nevada, sitting *en banc*, granted Petitioners'

Emergency Application for a Temporary Restraining Order ("TRO") so that the court could consider the constitutional issues raised by the Petitioners in a comprehensive manner. Pet. App. 10a, 18a. Hence, in order to maintain the status quo, "and good cause appearing," the District Court ordered that the Respondents be temporarily restrained from treating SB-6 as "passed" without the two-third vote required by Article 4, section18(2) of the Nevada Constitution. Pet. App. 18a-19a.[2] After additional briefing, a hearing on Petitioners' Motion for Preliminary Injunction and Respondents' Motion to Dismiss was held on July 16, 2003, and on July 18, 2003, the District Court entered its ruling granting Respondents' Motion to Dismiss and lifting the TRO. Pet. App. 14a. The claims by the Legislator Petitioners were dismissed as jurisdictionally barred under the *Rooker-Feldman* doctrine. Pet. App. 10a-12 (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-17 (1923); *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983)). The district court noted that the claims of the non-Legislator Petitioners were also likely barred by *Rooker-Feldman*, but dismissed those claims on the merits. Pet. App. 12a-14a. Within hours, the Legislator Petitioners[3] filed their Notice of Appeal and an emergency motion to the Ninth Circuit for a Preliminary Injunction Pending Appeal, which was denied later the same day by a motions panel consisting of Circuit Judges Graber and Wardlow, leaving the Nevada Legislature free to proceed with further consideration of SB-6 and other tax bills by simple majority vote rather than the two-thirds vote required by the Nevada Constitution. On July 19, 2003, Respondent

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[2] The Restraining Order was subsequently modified to restrain the Legislature from giving effect to *any* bill increasing taxes without the two-thirds vote required by the Nevada Constitution. Pet. App. 17a.

[3] The remaining Petitioners subsequently filed a notice of appeal of their own after their motion to intervene in the related state court action in *Guinn* was denied. The two appeals were then consolidated.

Nevada State Assembly "approved" another tax bill, SB-5, without the two-thirds vote required by the Nevada Constitution. Both SB-5 and the previously "passed" SB-6 were forwarded to the Nevada Senate for further consideration, but on Monday evening, July 21, 2003, the Senate and the Assembly were each able to garner the necessary two-thirds vote on an alternative tax bill, SB-8, which was then signed into law by the Governor and the special legislative session concluded without further action on either SB-5 or SB-6.

On May 12, 2004, the Ninth Circuit Court of Appeals, Circuit Judges T.G. Nelson, W. Fletcher, and Berzon, affirmed the District Court's *en banc* decision but on different grounds, holding that the Petitioners' claims for declaratory and injunctive relief were moot, and that their claim for nominal damages failed to state a cognizable injury.[4] Pet. App. 3a-5a.

On June 2, 2004, Petitioners filed with the Ninth Circuit a motion for panel rehearing, calling the court's attention to material points of fact and law that had been overlooked in the panel opinion. The panel relied on the fact that SB-6 had died with the legislative session to support its holding that Petitioners' equitable claims were moot, but overlooked the material fact that, during oral argument, the District Court had granted Petitioners' motion to enlarge the Temporary Restraining Order to bar Respondents from taking *any* action in violation of the two-thirds vote requirement of the Nevada

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[4] By reaching the merits of Petitioners' legal claims, the Ninth Circuit implicitly reversed the district court's holding that it was jurisdictionally barred by the *Rooker-Feldman* doctrine from considering Petitioners' claims. If the *Rooker-Feldman* jurisdictional bar remains viable, however, this Court should hold this petition pending resolution of *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3d Cir. 2004), *cert. granted*, 2004 WL 2058940 (U.S. Oct. 12, 2004) (No. 03-1696), in which this Court will again consider the scope of the *Rooker-Feldman* doctrine.

Constitution, not just from giving effect to SB-6. And the panel's holding dismissing Petitioners' legal claims for failure to state a cognizable injury was made without benefit of an evidentiary hearing, and overlooked or misapplied applicable precedent of this Court and conflicting decisions from other circuit courts. The petition for rehearing was nevertheless summarily denied without comment on June 22, 2004.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for at least four reasons.

- This case presents important questions of federal constitutional law under the Republican Guaranty Clause of Article IV and the Due Process and Equal Protection Clauses of the Fourteenth Amendment that have not been, but should be, considered by this Court.
- The Ninth Circuit's holding that Petitioners' equitable claims were moot misapplies established precedent of this Court and is in conflict with decisions of the First and Seventh Circuit Courts of Appeals.
- The Ninth Circuit's holding that claims of vote dilution and nullification are only viable if the illegal vote dilution or nullification altered the legislative outcome cannot be reconciled either with this Court's decision in *Coleman v. Miller*, directly on point, or with countless analogous voting rights cases in which this Court and numerous lower courts have considered the merits of vote dilution or vote nullification claims without even mentioning, must less giving dispositive weight to, the ultimate electoral outcome.
- The Ninth Circuit's refusal to treat as an actionable harm undisputed allegations that the unlawful vote dilution had altered the legislative dynamic is in conflict with decisions of the D.C. Circuit.

I. This Case Involves Important Questions Under the Republican Guaranty Clause of Article IV and the Due Process and Equal Protection Clauses of the Fourteenth Amendment That Have Not Been, But Should Be, Addressed by this Court.

A. Whether the Failure of State Officials To Comply With Structural Commands of Their State Constitution Gives Rise to a Justiciable Republican Guaranty Clause Claim Should Be Addressed by this Court.

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guaranty Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted for the Court in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 183 (1992). "Contemporary commentators," she wrote, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 398 (2d. ed. 1988); J ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118, and n, 122-123 (1980); W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); D. Merritt, *The Guarantee Clause and State Autonomy*, 88 COLUM. L. REV. 1, 70-78 (Jan, 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-565 (1962)).

Several lower courts have acknowledged that the Republican Guaranty Clause might present justiciable questions in the wake of *New York v. United States*, but thus far all have found that the Clause had not been violated under the par-

ticular circumstances of those cases. *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty, Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995); *but see*, *State ex. Rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Ore. 1997) (holding that Republican Guarantee claim is nonjusticiable).

This case presents one of the rare instances in which a Republican Guaranty Clause claim should be recognized as viable. The essence of the claim, drawn from this Court's opinion in *New York*, is whether a state's citizens may "structure their government as they see fit." *Kelley*, 69 F.3d at 1511. In *New York*, this Court dismissed the Guaranty Clause claim because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York 's government." 505 U.S. at 186. By imposing, through a constitutional amendment, a two-thirds vote requirement for tax increases, the citizens of Nevada adopted a new structure for their government with a new method of functioning when raising taxes. Actions that have a "realistic risk of altering the state's form of government" from what the citizens of the state have themselves adopted have been held to be amenable to Republican Guarantee Clause claims. *Texas*, 106 F.3d at 667; *New Jersey*, 91 F.3d at 468-69. Essentially, the federal courts are supposed to protect the structural preferences of a state's citizens, serving as a sort of "structural referee." *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

The decision by Respondent Nevada State Assembly to ignore the governing structure imposed upon it by the State's citizens via a constitutional amendment is just the kind of violation of the Article IV guaranty of a republican form of government that other federal courts have begun to entertain. Whether such claims are justiciable is an important question that has not been, but should be, considered by this Court; indeed, this Court invited just such a consideration in *New York* itself.

B. Whether Federal Constitutional Guarantees of Equal Protection and Due Process Check Unlawful Action by State Legislatures Purportedly Authorized by State Courts Is Also An Issue Worthy of this Court's Review.

Similarly, the extent to which the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment serve as a check on state legislative action purportedly authorized by arbitrary interpretations of a state constitution by the highest court of the State is an important question that has not been, but should be, addressed by this Court. State courts simply do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process. *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000). Necessarily, then, actions by state officials in reliance on the unconstitutional interpretation by the state's Supreme Court are as susceptible to the review of the federal courts and ultimately of this Court as would be the state court decision itself. The several ways in which the Nevada Supreme Court violated Due Process in rendering the decision relied on by Respondents for the actions they took in violation of the Nevada Constitution is therefore an important backdrop to this Court's review of the federal court decision below.

1. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party.

One of the most curious aspects of the Nevada Supreme Court's decision in *Guinn* was that no party ever asked the court to invalidate Article 4, Section 18(2), or even to suspend its operation in this session. *See Guinn I*, 71 P.3d, at 1276 (Maupin, J., dissenting) (noting without contradiction that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today"). The Governor, too, admitted during the federal court proceedings below that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." Brief for Defendant Guinn in Opposition to Mot. for Prelim. Inj., at 6. The un-requested remedy was nevertheless imposed by the Nevada Supreme Court, without argument or hearing, contrary to the most basic precepts of due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (holding that parties need "to know the issues on which decision will turn and to be apprised of the factual material" so that they may rebut claims against them) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

2. The Nevada Court Failed to Enforce A Valid Constitutional Amendment.

The Nevada Court gave life to the old law-school hypothetical notion of "unconstitutional constitutional amendments." The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended. *See, e.g.*, WALTER F. MURPHY, THE NATURE OF THE AMERICAN CONSTITUTION (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional*

Speech, 48 VAND. L. REV. 349, 380 (1995). Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, the Nevada Supreme Court was not addressing such a case. Unlike the examples typically used in the hypothetical context—separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments—the Nevada Supreme Court here *rejected*, rather than protected, a structural provision in favor of a non-structural one.

3. The Nevada Court Ignored Several Well-Established Canons of Construction.

The Nevada Supreme Court also ignored or misapplied a number of longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with "unclean hands."

The Nevada Court's utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them amounted to a perfect storm of Due Process violations. As a result, the arbitrary decision of the Nevada Supreme Court cannot serve to shield the unconstitutional actions by the Nevada State Assembly from federal court review.

II. The Ninth Circuit's Holding that the Nevada Legislature's Compliance With the Two-Third Vote Requirement On *Another* Tax Bill Rendered Moot Petitioners' Equitable Claims Seeking To Prevent Future Likely Violations of the Nevada Constitution Is Contrary To This Court's Precedent and In Conflict With Decisions of the First and Seventh Circuits.

The Ninth Circuit dismissed Petitioners' equitable claims on mootness grounds, despite the fact that the decision of the Nevada Supreme Court "authorizing" the Legislature to ignore the two-thirds vote provision of the Nevada Constitution remains on the books, where it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The Ninth Circuit's holding is contrary to long-established precedent of this Court and in conflict with recent decisions from the First and Seventh Circuits.

A. A Government's Voluntary Cessation of Illegal Conduct Does Not Render a Case Moot Where the Government Remain Free to Repeat the Illegal Conduct.

This Court has held that a case is not rendered moot by the voluntary cessation of the conduct challenged as unconstitutional unless "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 508 U.S. 656 (1993); *United States v. W.T. Grant Co*, 345 U.S. 629, 632 (1953); *Local 75, United Broth. Of Carpenters & Joiners of America, A.F. of L. v N.L.R.B.*, 341 U.S. 707, 715 (1951).

Here, although Respondents ultimately adopted *another* tax bill, SB-8, by the required two-thirds vote margin, Respondents remain free to pass—indeed, are likely to pass—a tax increase on a bare majority vote (rather than the constitutionally-required two-thirds vote) during the next legislative session, which convenes in February 2005. It is thus far from "absolutely clear" that the illegal conduct is not reasonably expected to recur.

Indeed, the Nevada Supreme Court in the related *Guinn* litigation itself acknowledged not just the possibility, but the likelihood, that the Legislature again will again ignore the two-thirds vote provision of the Nevada Constitution: "Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed." *Guinn II*, 76 P.3d, at 27 n.15. So did Senator Dina Titus, a member of Respondent Nevada State Senate here: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling" in *Guinn*. Steve Kanighe, *Landmark Ruling Likely to Affect Future Sessions*, Las Vegas Sun, July 12, 2003 at 1. *Available at* http://www.lasvegassun.com/sunbin/stories/sun/2003/jul/12/515333226.html. And the Nevada State Education Association ("NSEA"), one of the Governor's *amici*, made the same point in the *Guinn* litigation. In its brief opposing a motion to vacate, the NSEA contended—repeatedly—that the Nevada Supreme Court should *not* vacate its decision precisely because the legislative stand-off that resulted from the two-thirds vote requirement of the Nevada Constitution was so capable of repetition every budget cycle. Brief of Amici Curiae NSEA, *et al.*, at 5, *Guinn II* (noting that the damage allegedly inflicted upon school districts by the 2/3 vote provision "has not somehow been undone by the recent passage of the school funding bill"); *id.* at 6 ("The [July 10] opinion should

should not be withdrawn, because the crisis that precipitated it is otherwise likely to recur"); *see also* Brief of Amici Curiae NSEA, *et al.*, at 6 n.7 ("it is *highly probably* that this [legislative] session will not be the last in which the Gibbons initiative will result in a budget crisis") (emphasis added).

Thus, the standard set by this Court that a case becomes moot as the result of voluntary cessation only when "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," has not remotely been met, and the Ninth Circuit's erroneous ruling to the contrary warrants this Court's review, given the important constitutional issues that were thereby avoided by the Ninth Circuit.

Further, the Ninth Circuit's holding that Petitioners' claim for declaratory relief was rendered moot by the passage of SB-8—the intervening tax increase that made further consideration of SB-6 and SB-5 unnecessary—is in conflict with the Seventh Circuit's recent decision in *Crue v. Aiken*, 370 F.3d 668, (7th Cir. 2004). *Crue* dealt with a First Amendment challenge to the refusal by the Chancellor of the University of Illinois to permit, without prior approval, contact of prospective student-athletes by a University group wishing to discourage matriculation at the University because of its use of an Indian mascot. After the district court entered a temporary restraining order enjoining enforcement of the Chancellor's pre-clearance directive, the Chancellor retracted the directive. The Seventh Circuit held that the retraction rendered only the claim for injunctive relief moot; the claims for declaratory relief and for damages remained "live." *Id.*, at 677-678. The Court further stated: "When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive." *Id.* (*citing Wolff v. McDonnell*, 418 U.S. 539 (1974); *Powell v. McCormack*, 395 U.S. 486, 89 (1969);

Penny Saver Publ'ns, Inc. v. Village of Hazel Crest, 905 F.2d 150 (7th Cir.1990)).

Thus, even assuming that the Nevada Legislature's adoption of SB-8 by the constitutionally-required vote rendered Petitioners' claim for injunctive relief moot, the claim for declaratory relief survives as a predicate to the nominal damages claim. The Ninth Circuit's decision to the contrary is in conflict with the decision of the Seventh Circuit in *Crue*.

B. Even if Respondents' Subsequent Approval of SB-8 Rendered Petitioners' Equitable Claims Moot, the Ninth Circuit Still Had Jurisdiction Because Respondents' Actions Are Capable of Repetition, Yet Evading Review.

Even if all of Petitioners' equitable claims actually were moot despite the Legislature's voluntary cessation, the same concessions described above demonstrate that the case is capable of repetition yet evading review, an exception to the mootness bar. *See Moore v. Ogilvie*, 394 U.S. 814, 815 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This Court crafted the "capable of repetition" exception to mootness "partly because of the necessity or propriety of deciding some questions of law presented which might serve to guide municipal body when again called upon to act in this matter." *Southern Pacific*, 219 U.S., at 515-16 (quoting *Boise City Irrig. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904)).

The potential for injuries evading review is especially relevant here. Under the ostensible authority of the Nevada Supreme Court's July 10, 2003 writ of mandamus—entered in a case that had been filed only ten days earlier—the Legislature "passed" SB-6 within three days of the Nevada Supreme Court's ruling. The extremely fast pace of the events leading to this litigation suggests that, in the future, the deprivation of Petitioners' federal rights is again likely to recur without the opportunity to be heard. As Assemblyman Morse

Arberry, Chairman of the Assembly Ways and Means Committee, noted in the related *Guinn* state court action, "budgetary bills are typically among the last bills to be enacted in most legislative sessions." Brief of Respondent Assemblyman Morse Arberry in Opp. To Pet'n for Reh'g, at 3, *Guinn II*. They are "considered in the last week of the legislative session." *Id.*

Review is also warranted to resolve a recent circuit split concerning the proper scope of the "capable of repetition, yet evading review" exception. The Ninth Circuit's holding—that Petitioners' case is moot because "[n]either of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB-6 itself) may ever be repeated"—is in conflict with the First Circuit Court of Appeals' recent decision in *Becker v. Federal Election Comm'n*, 230 F.3d 381 (1st Cir. 2000). In *Becker*, the First Circuit held that presidential candidate Ralph Nader's challenge of corporate sponsorship of a presidential debate from which he was excluded did not become moot once the debates had been held because "corporate sponsorship of the debates is sure to be challenged again in future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult." *Id.* at 389 (citing *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2nd Cir. 1989); *Johnson v. F.C.C.*, 829 F.2d 157, 159 n. 7 (D.C. Cir. 1987)). The Ninth Circuit's focus on the concluded legislative session to support its mootness holding thus stands in stark contrast to the First Circuit's refusal to render a mootness determination by focusing only on the concluded presidential debate. Adoption by the Nevada Legislature of tax bills by simple majority vote is just as surely to be challenged in future legislative sessions as was the corporate sponsorship at issue in *Becker*, and the 120-day limit on Ne-

vada legislative sessions is, if anything, less than length of a presidential campaign season, yet the Ninth Circuit nevertheless rejected Petitioners' contention that the case was capable of repetition yet evading review.

III. The Ninth Circuit's Holding that Petitioners' Did Not Have a Cognizable Injury from Vote Dilution Is Inconsistent with this Court's Precedent and in Conflict with Decisions of Several Circuit Courts.

A. The fact that an unlawfully "passed" bill does not ultimately take effect does not negate vote dilution injury.

The issue raised by the Ninth Circuit's decision with respect to Petitioners' claim for nominal damages is whether an individual legislator whose vote has been unlawfully diluted (or whether a legislator's constituent whose representation has been unlawfully diluted) ever has a cognizable harm if, for other reasons, the bill on which the unlawful vote dilution occurred never takes effect. The Ninth Circuit misapplied *Raines v. Byrd*, 521 U.S. 811 (1997), *Coleman v. Miller*, 307 U.S. 433 (1939), and *Gutierrez v. Pangelinan*, 276 F.3d 539 (9th Cir. 2002), to hold that there is not a cognizable harm in such circumstances. The mistaken reading of *Coleman* and *Raines* accepted by the Ninth Circuit is so profound and far-reaching in its implication as to warrant this Court's attention.

In *Coleman*, this Court expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. 307 U.S., at 438 (holding that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes"). At issue in *Coleman* was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the State was permitted to cast a vote in the event of a tie. As this Court noted, "the

twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.*, at 441; *cf. Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "the harm worked by [a rule changing the amount of votes necessary to pass legislation]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent, as is the command of the Constitution that we remedy that harm").

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a state legislature's failure to comply with its own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway* v. *Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)).

Moreover, this Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of *state law*. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if . . . state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was le-

gally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S., at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id.*

The hypothetical case described in *Bender* is nearly identical to the case here. State law—Article 4, Section 18(2) of the Nevada Constitution—authorizes legislative action on tax increases "solely" by two-thirds vote. The disenfranchised legislators—the Legislator Petitioners here, who together provided enough votes to defeat the tax increase pursuant to the two-thirds vote requirement of Article 4—claimed that their vote was diluted below the weight required by state law. This is thus a classic case of vote dilution, in violation of the Due Process Clause.

This Court's recent decision in *Raines* is not to the contrary. *Raines* involved a challenge by six members of Congress—4 of 100 Senators and 2 of 435 Representatives—who alleged that the federal line item veto diluted their legislative power. This Court expressly distinguished *Coleman*, not because the legislative action at issue in *Coleman* had taken effect, as the Ninth Circuit contended, but because the number of legislators challenging the allegedly unlawful action in *Coleman*, unlike the number challenging the line-item veto in *Raines*, was sufficient to have affected the outcome. *Raines*, 521 U.S., at 812. It was for this reason that the *Raines* Court ruled that "the institutional injury [plaintiffs] allege is wholly abstract and widely dispersed (contra, *Coleman*)." *Id.*, at 829; *see also Silver v. Pataki*, 755 N.E.2d 842, 849 (N.Y. 2001) (allowing, under *Coleman*, vote nullification suit by a single legislator but disallowing, under *Raines*, as a mere abstract political harm, a claim by the same legislator that his ability to negotiate the Assembly's budgetary priorities had been affected).

Indeed, if the Ninth Circuit's interpretation of *Coleman* were correct, *Coleman* itself would have been decided differently. The federal constitutional amendment at issue in *Coleman*—the Child Labor Amendment, 43 Stat. 670—never did take effect. The Kansas legislature was just one part in the amendment process, just as the Nevada Assembly in this case is just one part of the legislative process. The decision by the Kansas Lieutenant Governor to cast a tie-breaking vote in favor of ratification and then to deem Kansas' ratification as "passed" no more gave ultimate "effect" to the amendment than did the decision by the Speaker of the Nevada Assembly deeming SB-6 as "passed" give effect to that tax increase. In both cases further action by other bodies was required before the Act would become effective. Yet in *Coleman* the Supreme Court considered the merits of the legislators' claims despite the fact that the allegedly unlawful vote dilution had not resulted in the proposed amendment actually taking effect. The claim of vote dilution, by a group of legislators sufficient in number to have affected the outcome, was alone sufficient to qualify as a cognizable injury.

This Court should grant certiorari in this case to consider what was only *dicta* in *Bender*, and to address the implicit split on this issue between the decisions of the Ninth Circuit below and the related decision of the Nevada Supreme Court in *Guinn*, on the one hand, and the Fourth and Ninth Circuits and the District of Vermont, in *Richardson, Rea*, and *Conway*, respectively, on the other.

B. The Ninth Circuit's holding has far-reaching consequences.

The implication of the Ninth Circuit's "no harm, no foul" holding is far-reaching. Vote dilution or outright vote nullification claims by individual voters could only be sustained if the candidate opposed (or supported) by the disenfranchised voters was actually elected (or defeated). That has never been a consideration in this Court's vote dilution jurispru-

dence, *see, e.g., Miller v. Johnson*, 515 U.S. 900 (1995), yet the Ninth Circuit's holding compels such a result.

The Ninth Circuit's outcome-determinative test is in conflict with decisions from other circuit courts as well. The First, Fifth, Eighth and D.C. Circuit Courts of Appeal, for example, have all considered vote dilution claims, and none have applied the outcome determinative test adopted by the Ninth Circuit. *See, e.g., Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395 (8th Cir. 1985); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36-37 (1st Cir. 1993) (citing *AVX Corp. v. United States*, 962 F.2d 108, 113-14 (1st Cir. 1992)); *Daughtrey v. Carter*, 584 F.2d 1050, 1057 (D.C. Cir. 1978); *Creel v. Freeman*, 531 F.2d 286, 286-89 (5th Cir. 1976); *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152, 1152-56 (4th Cir. 1975); *Skaggs*, 110 F.3d, at 833.

C. The Ninth Circuit's holding also failed to recognize cognizable injuries of the non-Legislator Petitioners that have been recognized by this Court and other circuit courts.

This Court has repeatedly recognized vote dilution claims by voters. *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). "'[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

That the dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d, at 834. As the D.C. Circuit noted in *Michel*: "It could not be argued seriously that voters would not have an injury if their

congressman was not permitted to vote at all on the House floor." 14 F.3d, at 626. Depriving voters of the full weight of the representation guaranteed by the Nevada Constitution's two-thirds vote requirement is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

The Ninth Circuit's decision below dismissing the vote dilution claims of the non-Legislator Petitioners is thus contrary to well-established precedent of this Court and in conflict with holdings of the D.C. Circuit in *Michel* and *Skaggs*. Certiorari is warranted.

The Nevada Supreme Court's decision has also effectively nullified the votes several of the Petitioners successfully cast in support of the Gibbons Constitutional Tax Initiative in 1994 and 1996, by which an overwhelming percentage of Nevadans approved the two-thirds vote amendment to the state Constitution. The right to vote constitutes more than just the right to show up at a voting booth. It encompasses the right to have that vote counted and, if successful, to have the results of the vote given effect. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

By deeming tax increases as "passed" by simple majority rule, Respondent Nevada State Assembly essentially treated the successful vote of some Petitioners for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Nevada State Assembly deprived Petitioners of their right to an effective vote, a right protected by the Fourteenth Amendment of the U.S. Constitution.

In addition, Respondent Nevada State Assembly essentially gave greater—indeed dispositive—weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05

(2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another") (citing *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 665 (1966)).[5]

Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the decision of the Ninth Circuit dismissing Petitioners' federal constitutional claims is clearly contrary to the decisions of this Court and certiorari is warranted.

D. The Ninth Circuit's Refusal To Treat As an Actionable Harm Undisputed Evidence that the Unlawful Vote Dilution Altered the Legislative Dynamic Is in Conflict with Decisions of the D.C. Circuit.

Finally, the Ninth Circuit's decision treated as irrelevant undisputed allegations[6] that the Nevada Assembly's unconstitutional vote dilution had altered the legislative dynamic,

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[5] The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S., at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).

[6] Because the action by the Nevada Legislature approving *another* tax bill by the required two-thirds vote occurred *after* the district court dismissed the case, there was never an evidentiary hearing to determine whether Petitioners could demonstrate other sufficiently concrete injuries to support federal jurisdiction over the suit, or even an opportunity for Petitioners to amend their complaint to allege such injuries. Nevertheless, Respondents acknowledged—indeed, touted—the changed legislative dynamic in briefing before the Nevada Supreme Court in the related *Guinn* litigation, so Petitioners' assertion of a changed legislative dynamic is "undisputed." *Guinn II*, 76 P.3d at 25 (quoting Brief of Legislature in Opp. to Pet'n for Reh'g at 5).

holding instead that Petitioners had failed to establish any cognizable harm.

The Ninth Circuit's decision stands in stark contrast with that of the D.C. Circuit in *Skaggs*. In *Skaggs*, the D.C. Circuit recognized that "the harm worked by [a rule changing the amount of votes necessary to pass a bill]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent." *Id.*, at 833; *see also Michel,* 14 F.3d, at 632 (rejecting claim that allowing non-member Congressional delegates to vote in committee of the whole "causes a change in the dynamics of the behavior of the House" not because changed dynamics were not sufficient for a vote dilution claim, but because the particular change at issue in that case was "largely symbolic").

This conflict, too, warrants this Court's attention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

Dated: October 20, 2004.

APPENDICES

APPENDIX A
NINTH CIRCUIT OPINION

United States Court of Appeals
For the Ninth Circuit

Mark E. AMODEI; Walter Andonov; Sharron E. Angle; Ray Bacon; Bob Beers; David F. Brown; John C. Carpenter; Barbara K. Cegavske; Lynn Chapman; Chad Christensen; Thomas Cox; Jill Dickman; Eddie Floyd; Peter J. Gocoechea; Thomas J. Grady; Donald G. Gustavson; Christopher Hansen, Janine Hansen; Joel Hansen; Jonathan Hansen; Warren B. Hardy, II; Lynn C. Hettrick; Dolores Holets; Thomas Jefferson; O.Q. Chris Johnson; Ronald L. Knecht; Robert Larkin; Mary Lau; John Lusk; R. Garn Mabey, Jr.; Larry Martin; John W. Marvel; Mike McGinness; Nanette Moffitt; Judith Moss; Nevada Concerned Citizens; Nevada Manufacturers Association; Nevadans for Tax Restraint; Dennis Nolan; Ann O'Connell; Stan Paher; Retail Association of Nevada; Dean A. Rhoads; Roderick R. Sherer; David Shuman; Ira Victor Spinack; Sandra J. Tiffany; Maurice E. Washington; Valerie E. Weber; Greg White; Richard Ziser,

Plaintiffs--Appellants,

v.

NEVADA STATE SENATE; Nevada State Assembly; Nevada State Legislature; Diane Keetch; Lorraine T. Hunt; Dean Heller; Kenny Guinn; Brenda Erdoes; Claire J. Clift; Charles E. Chinnock,

Defendants--Appellees.

No. 03-16326.

Argued and Submitted April 15, 2004.
Decided May 12, 2004.

Before: T.G. NELSON, W. FLETCHER, and BERZON, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellants, members of the Nevada Legislature ("Legislator Plaintiffs") and citizens and taxpayers of Nevada ("Non-Legislator Plaintiffs"), brought suit in federal district court under 42 U.S.C. § 1983 against other members of the Nevada Legislature, the Governor of Nevada, and other state officials. Appellants alleged violations of their federal due process and equal protection rights, and of the Republican Guaranty Clause, Article IV, Section 4, of the United States Constitution. The district court dismissed the suit in part as barred by the *Rooker-Feldman* doctrine, and in part for failure to state a claim. As the parties are familiar with the facts of this case, we do not repeat them here. We affirm.

ANALYSIS

The passage of SB 8, a bill increasing public revenues and appropriating funds for public education, by a two-third vote of both the State Senate and the State Assembly, and the enactment of that bill into law, rendered Appellants' claims for declaratory and injunctive relief moot. "A case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Porter v. Jones,* 319 F.3d 483, 489 (9th Cir.2003) (quotation marks omitted). Appellants' claims for declaratory and injunctive relief rely on the supposed intention of the defen-

dants to permit SB 6 to become law without the two-third vote required by the Nevada state constitution. The passage of SB 8 negated any such possibility. Therefore, appellants' claims for declaratory and injunctive relief are moot.

This case is not saved from mootness by either the "voluntary cessation" nor "capable-of-repetition-yet-evading-review" branches of the mootness doctrine. These branches require, respectively, a determination that "the allegedly wrongful behavior could . . . reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), and that "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Porter*, 319 F.3d at 489-90. Neither of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB 6 itself) may ever be repeated, as they were both directed to specific periods in time that have already passed (i.e., the 20th Special Session, and the period for planning the 2004 budget).

Appellants' remaining claim for nominal damages remains a live controversy, however. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) ("[W]e must conclude that Berhardt's claims for prospective relief are moot, although we hold that her possible entitlement to nominal damages creates a continuing live controversy."); *Porter*, 319 F.3d at 489 ("Plaintiffs retain a cognizable interest in their claims for damages, which clearly indicates that a live controversy remains between the parties."). The district court dismissed this claim on two grounds: lack of subject matter jurisdiction (with respect to the Legislator Plaintiffs) and failure to state a claim, under Rule 12(b)(6) (with respect to the Non-Legislator Plaintiffs). We review the district court's dismissal de novo. *Kougasian v. TMSL*, 359 F.3d

1136, 1139 (9th Cir. 2004) (reviewing a district court's dismissal for lack of subject matter jurisdiction de novo); *Vestar Development II, LLC v. General Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) ("This court reviews de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)."). We affirm the district court's dismissal of this claim on the ground that Appellants have failed to allege an injury.

Article III of the Constitution requires that a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," for a federal court to assert jurisdiction over the suit. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted). "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright,* 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "Abstract injury is not enough" to sustain federal jurisdiction. *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 219, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)) (internal quotation marks omitted). Here, Plaintiffs have alleged only an abstract injury. SB 6 did not pass the State Senate and was not enacted into law. No taxpayer paid a nickel into the coffers of Nevada under its rule. Although the members of the Assembly who voted against SB 6 claim a completed injury through vote dilution, there is no cognizable injury in fact, sufficient to establish an Article III controversy, where the vote in question never resulted in legislation. *See Raines v. Byrd,* 521 U.S. 811, 824, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (holding that the legislator plaintiffs did not allege a sufficient injury because they did not "allege[ ] that they voted for a specific bill, that there were sufficient votes to pass the

bill, and that the bill was nonetheless deemed defeated"). Thus, Appellants have failed to allege a sufficiently concrete injury to support federal jurisdiction over the suit. *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), does not require a contrary result. As the Supreme Court stated in *Raines, "Coleman* stands (at most ...) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue *if that legislative action goes into effect (or does not go into effect),* on the ground that their votes have been completely nullified." 521 U.S. at 823, 117 S.Ct. 2312 (emphasis added). This court has further explained that "the critical fact in *Coleman* was that if the plaintiff-senators were correct on the merits, their votes should have been sufficient to effect a particular result (defeat of the resolution); *but the allegedly illegal act instead effected the opposite result (certification of the resolution)." Gutierrez v. Pangelinan,* 276 F.3d 539, 545-46 (9th Cir. 2002) (emphasis added). In the case at hand, if the Plaintiffs were correct on the merits, their votes should have been sufficient to defeat SB 6. The allegedly illegal act did not, however, "effect[ ] the opposite result," namely, the enactment of SB 6 into law. Therefore, *Coleman* is of no avail to Plaintiffs in their pursuit of standing.

AFFIRMED.

APPENDIX B
DENIAL OF PRELIMINARY INJUNCTION PENDING APPEAL

United States Court of Appeals
For the Ninth Circuit

HON. SHARRON E. ANGLE, *et al.*,

Plaintiff-Appellants,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants-Appellees.

OPINION
CV-N-03-0371

JULY 18, 2003

Before: GRABER AND WARDLAW, Circuit Judges

Appellants' emergency motion for preliminary injunction pending appeal is denied.

This case is set for expedited briefing. The opening brief and excerpts of record are due August 29, 2003; the answering brief is due September 29, 2003; and the optional reply brief is due within 14 days after service of the answering brief. The Clerk shall calendar this case for submission as soon as possible following receipt of the answering brief.

APPENDIX C

DISTRICT COURT OPINION

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, *et al.*,

Plaintiff,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants.

CV-N-03-0371

July 18, 2004

OPINION

Before PRO, Chief Judge, and McKIBBEN, HAGEN, HUNT, DAWSON, HICKS, and MAHAN, Judges.

PER CURIAM

Before the court is plaintiffs' motion for preliminary injunction. This action arises from the failure of the Nevada legislature, within the time limits set by the Governor, to approve and fund a balanced budget and to appropriate funds for public education for the 2003-2005 biennium. Upon petition of the Governor, the Nevada Supreme Court issued a Writ of Mandamus which interpreted the Nevada Constitu-

tion in a manner that allowed the Legislature to pass a tax increase without the constitutionally mandated two-thirds majority and then ordered lawmakers to proceed under that interpretation. When the Assembly thereafter passed the tax bill, SB 6, by a simple majority, plaintiffs filed for relief in this court.

I. Factual Background

After Nevada voters twice approved by initiative a requirement that any tax increase be passed by a two-thirds majority vote in the Legislature, the Nevada Constitution was amended in 1996 to so provide. Now, Article 4, §18(2) requires a two-thirds vote of each House "to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes...." This differs from the simple majority provision required to pass other bills or joint resolutions. *See* Article 4, §18(1). Article 11 of the Nevada Constitution instructs the Legislature to provide funding for the support and maintenance of the state's public schools.

Nevada's 2004 fiscal year began on July 1, 2003, but the Nevada Legislature did not as of that date, and has not yet, appropriated funds to support and maintain Nevada's budget for the 2003-2005 biennium. As a result, on July 1, 2003, the Governor of the State of Nevada petitioned the Nevada Supreme Court for a Writ of Mandamus declaring the Nevada Legislature to be in violation of the Nevada Constitution and compelling the Legislature to fulfill its constitutional duty to increase revenues to balance Nevada's budget for the biennium beginning July 1, 2003, and to fund public education during that fiscal period.

On July 10, 2003 the Supreme Court of Nevada issued an Opinion and Writ of Mandamus holding that the education requirement of Article 11 override the Article 4, §18(2) provision that makes a two-thirds majority vote necessary to

raise taxes. The Writ directed the Nevada Legislature "to proceed expeditiously with the 20th Special Session under simple majority rule." On July 13, 2003, consistent with the ruling of the Nevada Supreme Court, the Nevada Assembly passed SB 6, a tax increase measure, by vote of 26 in favor and 16 against, which was short of the two-thirds majority provided for by Article 4, §18(2) of the Nevada Constitution.

On July 14, 2003, plaintiffs, consisting of members of the Nevada Legislature and Nevada voters and taxpayers, filed a complaint for injunctive, declaratory and legal relief under the Republican Guarantee Clause of Article IV of the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and Title 442, United States Code, Sections 1983 and 1988. Named as defendants are several members of the Nevada Legislature, the Governor and Lieutenant Governor of the State of Nevada, and various Nevada government officials charged with implementing legislation enacted by the Nevada Legislature, which could potentially include SB 6.

Plaintiffs seek a declaration from this court that passage of SB 6 without the two-thirds vote required by Article 4, §18(2) of the Nevada Constitution diluted the votes of the Legislator Plaintiffs and diluted the representation to which the Non-Legislator Plaintiffs were entitled, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Republican Guarantee Clause. Plaintiffs also seek to enjoin the defendants from violating Article 4, §18(2) and from giving effect to the action of the Nevada Assembly deeming SB 6 as "passed" without the two-thirds vote required by that provision of the Nevada Constitution.

Also on July 14, 2003, the plaintiffs filed an Emergency Application for Temporary Restraining Order and for an Order to Show Cause Re Preliminary Injunction preventing the defendants from violating Article 4, §18(2) of the Nevada

Constitution and from giving effect to the Assembly's action on July 13, 2003.

Anticipating that other actions would be filed in the District of Nevada[1] raising a similar challenge to the actions of the Nevada Legislature and the Nevada Supreme Court, the active district judges of the court determined it appropriate to consider the plaintiffs' Application for Injunctive Relief en banc. To preserve the status quo pending the *en banc* hearing, this court temporarily restrained the defendants from giving effect to SB 6 as "passed" without the two-thirds vote as required by Article 4, §18(2) of the Nevada Constitution. This temporary injunctive relief did not otherwise limit the actions of the Nevada Legislature. On July 16, 2003, the court conducted an en banc hearing regarding Plaintiffs' Emergency Application for Preliminary Injunctive Relief.

II. Analysis

A. Subject Matter Jurisdiction

The United States Supreme Court has enunciated that "the jurisdiction possessed by the United States District Courts is strictly original" and that district courts have not power to declare that a judgment or ruling of a state supreme court violated provisions of the federal Constitution. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414-417 (1923). What became known as the *Rooker-Feldman* doctrine was the result of an amplification of that decision in *District of Columbia Court of Appeals, et al. v. Feldman*, in which the Supreme Court emphatically pronounced that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. 460 U.S. 462, 482

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[1] Two such actions have already been filed.

(1983). In *Feldman*, the Supreme Court articulated this doctrine as follows:

> If the Constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 483 n. 16

> United States District Courts...do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Id at 486.

"*Rooker-Feldman* is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower courts from hearing de facto appeals from state court judgments...." *Bianchi v. Rylaarsdam*, No. 00-55585, 2003 WL 21480364, *3 (9th Cir. June 27, 2003)(above quotes form *Feldman* at 583 n. 16 & 485 omitted). In footnote 4 of that opinion, at page *9, the *Bianchi* court noted that,

> It is immaterial that *Bianchi* frames his federal complaint as a constitutional challenge to the state courts' decisions, rather than as a direct appeal of those decisions. The *Rooker-Feldman* doctrine prevents lower federal courts from exercising jurisdiction over any claim that is 'inextricably intertwined' with the decision of the state court, even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principle.

As established by these authorities, a plaintiff in a United States District Court who was a party to the proceedings in state court confronts an unequivocal jurisdictional bar. *See id.* at *8.

1. Legislator Plaintiffs

Because the Legislator Plaintiffs were named respondents in the Writ, they were parties to the state court action and are precluded form proceeding in this court under the *Rooker-Feldman* doctrine. Indeed, they filed a counter-petition in the state supreme court, which was denied, and have the opportunity to seek reconsideration in that court. Moreover, the Legislator Plaintiffs' claims before this court are direct attacks on the Nevada Supreme Court decision. Because this court cannot grant the relief requested by the Legislator Plaintiffs without voiding the decision of the Nevada Supreme Court, subject matter jurisdiction to consider their claims is lacking. *See District of Columbia Court of Appeals, et al. v. Feldman*, 460 U.S. 462, 483 n. 16 (1983). The only federal court suitable to address those claims is the United States Supreme Court. *See* 28 U.S.C. § 1257.

2. Non-Legislator Plaintiffs

The reach of the *Rooker-Feldman* doctrine to the district court's jurisdiction over the litigants who were not parties to the state court action is less clear. Generally, a plaintiff in the United States District Court who was not a party to the state court proceeding with which his current federal claims are inextricably intertwined is not within the ambit of the *Rooker-Feldman* doctrine unless that party directly attacks the state court judgment. See *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994). In Johnson, the Court concluded that jurisdiction existed in the lower federal court over the government's claims because it was not a party to

the challenged state court proceedings and, importantly, was not directly attacking the state court judgment. *Id.*

In the instant case, although the Non-Legislator Plaintiffs were not parties to the underlying state court action, they do by their application for injunctive relief directly attack the Nevada Supreme Court's decision. This court can not provide the relief they request without passing judgment on the highest state court's interpretation of its own constitution. In this regard, the situation before us may be distinguishable from the one presented to the Supreme Court in *Johnson*. *See id.* Moreover, in *Rooker* itself, the case presented to the district court included two defendants who had not been parties to the state court litigation. *See* 263 U.S. 413, 414 (1923).

The Legislator Plaintiffs have elected to join the Non-Legislator Plaintiffs in this action and have not sought a severance of their claims. At this stage, it is difficult to determine if they seek relief independent of each other. Under these circumstances, it is not clear that the Ninth Circuit cases holding that the court may have jurisdiction over a plaintiff who was not a party to the underlying state court action are applicable to a case such as this, which directly attacks the decision of the Nevada Supreme Court and has been artfully drafted to include parties who were not parties to the original state court proceedings. See *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998).

Clearly, the claims of the Non-Legislators Plaintiffs, which are identical to those of the Legislator Plaintiff, constitute a direct attack on the decision of the Nevada Supreme Court. Thus, there remains a viable question whether the *Rooker-Feldman* doctrine should be extended to them as well. *See Johnson*, 512 U.S. at 1005-06. Even if this court has jurisdiction over the Non-legislator Plaintiffs, however, their claims cannot survive the requirements of Fed. R. Civ. P. 12(b)(6) because they do not state a claim against the de-

fendants named in the action. Unless the Nevada Supreme Court's decision in *Guinn v. Legislature* is set aside, the defendants herein were in compliance with the law as mandated by the highest court of the State of Nevada, and the claims of the Non-Legislator Plaintiffs cannot succeed against them. Because we have decided this case on the foregoing grounds, we need not address the substantial issues of immunity and ripeness.

The dismissal should, however, be without prejudice to refile in the state courts of Nevada, or alternatively in this court, if in their new action, the Non-Legislator Plaintiffs do not include parties who were also parties to the original Nevada Supreme Court proceeding.

III. Conclusion

IT IS THEREFORE ORDERED that this court's Temporary Restraining Order entered July 14, 2003 is dissolved, and the Legislator Plaintiffs' action is hereby dismissed for lack of subject matter jurisdiction. The claims of the Non-Legislator Plaintiffs are dismissed without prejudice.

APPENDIX D
MINUTE ORDER

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, HON. WALTER ANDONOV, HON. BOB BEERS, HON. DAVID F. BROWN, HON. JOHN C. CARPENTER, HON. CHAD CHRISTENSEN, HON. PETER J. GOICOECHEA, HON. THOMAS J. GRADY, HON. DONALD G. GUSTAVSON, HON, LYNN C. HETTRICH, HON. RONALD L. KNECHT, HON. R. GARN MABEY, JR., HON, JOHN W. MARVEL, HON. RODERICK R. SHERER, HON. VALERIE E. WEBER, Members of the Assembly of the State of Nevada; *et al.*,

Plaintiff(s),

v.

THE LEGISLATURE OF THE STATE OF NEVADA; *et al.*,

Defendant(s).

CV-N-03-371-HDM (VPC)
Minutes of the Court
July 16, 2003

PRESENT:

THE HONORABLE PHILIP M. PRO, CHIEF UNITED STATES DISTRICT JUDGE

THE HONORABLE HOWARD D. McKIBBEN, UNITED STATES DITRICT JUDGE

THE HONORABLE DAVID W. HAGEN, UNITED STATES DISTRICT JUDGE

THE HONORABLE ROGER L. HUNT, UNITED STATES DISTRICT JUDGE

THE HONORABLE KENT J. DAWSON, UNITED STATES DISTRICT JUDGE

THE HONORABLE LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

THE HONORABLE JAMES C. MAHAN, UNITED STATES DISTRICT JUDGE.

Deputy Clerk: Bette Stewart/ Donna Andrews

Reporter: Kathryn M. French

Council for Plaintiff(s): John C. Eastman, Jeffrey A. Dickerson, and Erik S. Jaffe

Council for Defendant(s): William L. Keane, Bradley A. Wilkinson, N. Patrick Flanagan, Brian Sandoval, Jeff Parker, and Richard C. Linstrom

PROCEEDINGS: En Banc Hearing on:

Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (#4/5)/Defendants Heller, Guinn and Chinnock's Motions to Dismiss (#13/15)

9:00 a.m. Court convenes.

Arguments are presented on behalf of the plaintiffs by John Eastman, on belalf of the legislative defendants by William Keane and Bradley Wilkinson, and on behalf of defendants Heller, Guinn and Chinnock by Jeff Parker and Richard Linstrom. Counsel respond to questions of the court.

IT IS ORDERED that the plaintiffs' Application to Show Cause Re Preliminary Injunction (#5) and Defendants Heller, Guinn, and Chinnock Motion to Dismiss (#13/15) stand submitted.

IT IS ORDERED that the Application to File Brief Amicus Curiae of Pacific Legal Foundation and American Legislative Exchange Council in Support of Plaintiffs and Motion for Relief (#11/12) are denied.

IT IS ORDERED that plaintiffs' oral motion to amend the motion for temporary restraining order to bar any action in violation of the two-thirds requirement is granted. The temporary restraining order, as modified, shall remain in effect pending further order of the court.

10:37 a.m. Court adjourns.

Lance S. Wilson, Clerk

By: /s/ (Deputy Clerk)

APPENDIX E

TEMPORARY RESTRAINING ORDER

United States District Court
District of Nevada

HON. SHARRON E. ANGLE, *et al.*,

Plaintiffs,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Defendants.

CV-N-03-0371-HDM (VPC)

July 14, 2003

ORDER

This action having been referred by the Honorable Howard D. McKibben, United States District Jude, to the undersigned as Chief Judge for consideration of assignment to the active United States District Judge of this Court sitting en banc, and the undersigned having conferred with each of the active judges of the Court, and having determined that the issues raised in Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction should be considered in a comprehensive manner by the active District Judges of this Court sitting en banc, and to preserve the status quo pending such en banc consideration, and good cause appearing.

IT IS ORDERED that Defendants are hereby temporarily restrained from giving effect to the action on July 13, 2003, by the Nevada Assembly deeming SB 6 as "passed" without the two-third vote required by the Article IV, §18(2) of the Nevada Constitution, pending hearing on and further Order of the Court regarding Plaintiffs' Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction.

IT IS FURTHER ORDERED that Plaintiffs' Emergency Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction is hereby scheduled for hearing before the active District Judges of this Court sitting en banc at Las Vegas and Reno, Nevada, to be held on Wednesday, July 16, 2003, at 9:00 a.m. in Courtroom #7C of the Lloyd D. George United States Courthouse, Las Vegas, Nevada, and Courtroom #5 of the Bruce R. Thompson United States Courthouse, Reno, Nevada.

IT IS FURTHER ORDERED that unless otherwise Ordered by the Court, no bond shall be required of Plaintiffs to secure the relief requested.

IT IS FURTHER ORDERED that Plaintiffs shall immediately give notice to Defendants of the hearing scheduled for July 16, 2003, at 9:00 a.m., and the Defendants shall have to and including Tuesday, July 15, 2003, by 12:00 noon within which to file in the United States District Court at Reno, Nevada, any Memorandum of Authorities in response to Plaintiffs' Application for Injunctive Relief.

DATED: July 14, 2003

/s/

PHILIP M. PRO

Chief United States District Judge

APPENDIX F

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
For the Ninth Circuit

Mark E. AMODEI; *et al.*,

Plaintiffs-Appellants,

v.

NEVADA STATE SENATE; *et al.*,

Defendants-Appellees.

No. 03-16326.
D.C. No.
CV-03-00371-HDM/VPC
District of Nevada, Reno
June 22, 2004

Order

Before: T.G. NELSON, W. FLETCHER, and BERZON, Circuit Judges.

By unanimous vote of the panel, Appellants' petition for rehearing is DENIED.

(2)

Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

No. 04-542

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *ET AL.*,

Petitioners,

v.

THE LEGISLATURE OF THE STATE OF NEVADA, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should exercise jurisdiction over a case in which all Petitioners lack standing.
2. Whether this Court should exercise jurisdiction over a case in which not only do all Petitioners lack standing, but many Petitioners also are subject to the *Rooker-Feldman* doctrine for having previously litigated and unsuccessfully appealed to this Court the Nevada Supreme Court's decisions at the core of the instant case.
3. Whether this Court should exercise jurisdiction over a case in which all claims for relief are either moot or not viable based upon Respondents' immunity.
4. Whether this Court should exercise jurisdiction over a case to review an unpublished decision which does not create any split of authority.
5. Whether this Court should exercise jurisdiction over a case in which the Federal District Court and the Court of Appeals reached the right result, the result is based upon the Nevada Supreme Court's interpretation of the Nevada Constitution and, further, the result is supported by alternative independent grounds.

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C. There is no conflict with the cases cited by Petitioners regarding the standing of Legislators to bring institutional injury claims 23

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STATEMENT OF THE CASE

At its core, the instant case is an attempt to relitigate in federal court the Nevada Supreme Court's decisions in another case — *Guinn v. Legislature of the State of Nevada* — a case to which many of the Petitioners in the instant case were parties, and regarding which they exhausted all available challenges and appeals without success. *Guinn v. Legislature,* 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub. nom., Angle v. Guinn*, 124 S. Ct. 1662 (March 22, 2004). In *Guinn I*, the Nevada Supreme Court issued an order and writ of mandamus ("*Guinn* Order") directing the Nevada Legislature to enact revenue-raising bills upon simple majority votes rather than two-thirds votes during a specified and limited period of time. Pet. App. 3a, 9a; *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 24. Respondents[1] proceeded to obey the *Guinn* Order as the *Guinn* Order required them to do. Petitioners then brought the instant action against Respondents based upon Respondents' actions in preparation for enacting legislation pursuant to the *Guinn* Order as well as Respondents' alleged intent to actually enact legislation pursuant to the *Guinn* Order. Pet. App. 9a. Petitioners have maintained this case through the Ninth Circuit Court of Appeals ("Ninth Circuit") and to this Court despite the fact that the *Guinn* Order was litigated and appealed to the fullest extent possible in the *Guinn* litigation and, pursuant to that litigation, the *Guinn* Order was never found by any court to be invalid or incorrect in any way. *Angle*, 124 S. Ct. at 1662-63; *Guinn II*, 76 P.3d at 33. Petitioners also have maintained this case despite the fact that, soon after the decision of the United States District Court for the District of Nevada ("District Court"), the *Guinn*

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[1] For the purposes of the instant brief, "Respondents" includes only those Respondents on whose behalf this brief is filed, specifically, the Nevada Legislature and the other Respondents who are entities, officers or employees of the Nevada Legislature.

Order expired without any legislation actually being enacted by simple majority votes. Pet. App. 3a; *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). These facts are explained below.

In June of 2003, Nevada Governor Kenny Guinn ("Governor Guinn") called the Nevada Legislature to its 20th Special Session, the primary purpose of which was to enact a bill to increase taxes so that the budget of the State would be fully funded as required by the Nevada Constitution. *Guinn I*, 71 P.3d at 1273. On July 1, 2003, as the Nevada Legislature's 20th Special Session continued, Governor Guinn commenced the *Guinn* case by requesting, in part, that the Nevada Supreme Court issue a writ of mandamus ordering the Nevada Legislature to raise revenue for education by a date certain. Pet. App. 8a; *Guinn I*, 71 P.3d at 1272. The Nevada Legislature responded with a brief arguing both *against* the issuance of the writ and *in favor of* interpreting the legislative voting requirements in the Nevada Constitution to require two-thirds votes to enact revenue-raising bills. *Guinn II*, 76 P.3d at 28. However, neither of these arguments of the Nevada Legislature prevailed. On July 10, 2003, based upon the facts and circumstances present during the 20th Special Session, the Nevada Supreme Court issued its *Guinn I* opinion and order, which interpreted the legislative voting requirements in the Nevada Constitution to require — solely for the duration of the 20th Special Session — simple majority votes to enact revenue-raising bills. Pet. App. 8a-9a; *Guinn I*, 71 P.3d at 1274-76; *Guinn II*, 76 P.3d at 24-25. Then, also pursuant to its *Guinn I* opinion and order, the Nevada Supreme Court issued a writ of mandamus ordering the Nevada Legislature to proceed with the 20th Special Session using simple majority votes to enact revenue-raising bills. Pet. App. 8a-9a; *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 24.

The period during which the Nevada Supreme Court's *Guinn* Order directed the actions of the Nevada Legislature expired by the terms of the *Guinn* Order itself as of the end of

the 20th Special Session of the Nevada Legislature — specifically, on July 22, 2003. Pet. App. 2a, 9a; *Guinn II*, 76 P.3d at 25, 33. However, a number of the Petitioners in the instant case continued to challenge and appeal the *Guinn* Order. They first filed a petition for rehearing at the Nevada Supreme Court. *Guinn II*, 76 P.3d at 25. When the petition for rehearing failed (*Guinn II*, 76 P.3d at 33), they then appealed the *Guinn* Order to this Court through a petition for a writ of certiorari, which this Court denied. *Angle*, 124 S. Ct. at 1662-63.

Ironically, despite the *Guinn* Order, no revenue-raising bills were actually enacted with less than a two-thirds vote in each house of the Nevada Legislature because the only revenue-raising bill that was enacted, Senate Bill 8, received a two-thirds vote in each house.[2] Pet. App. 2a, 4a; *Guinn II*, 76 P.3d at 33. Senate Bill 8, enacted on July 21, 2003, appropriated money to fund education and increased taxes to balance the budget. *Guinn II*, 76 P.3d at 33. This brought the 20th Special Session to an end and, thereby, caused the *Guinn* Order to expire by its own terms.[3] Pet. App. 3a; *Guinn II*, 76 P.3d at 25, 33.

While the *Guinn* Order was in effect, it changed the result on only one vote in one house of the Nevada Legislature. On July 13, 2003, three days after the *Guinn* Order was issued, the Nevada Assembly voted upon an amended version of Senate Bill 6, a revenue-raising bill which would have required a two-thirds vote for passage in the absence of the *Guinn* Order.[4] Pet. App. 9a. As required by the *Guinn* Order, the Nevada Assembly and its officers and employees

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[2] The history of Senate Bill 8 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1258.

[3] Both houses of the Nevada Legislature adjourned *sine die* within minutes of 1:30 a.m. on July 22, 2003, less than 3 hours after Senate Bill 8 received final approval by two-thirds votes in both houses.

[4] The history of Senate Bill 6 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1235.

considered Senate Bill 6 to be passed from the Nevada Assembly upon the simple majority vote that occurred on that day. *Id.* However, although the *Guinn* Order would have required Senate Bill 6 to be considered enacted if the Nevada Senate had thereafter approved the Assembly version of Senate Bill 6 by a simple majority vote, such approval from the Nevada Senate never occurred. Pet. App. 4a. Instead, Senate Bill 6 ended up in conference committee, where it died on July 22, 2003, when the 20th Special Session ended.[5]

Petitioners incorrectly assert that the *Guinn* Order also affected the result of the vote on Senate Bill 5, an amended version of which was passed by the Nevada Assembly by a simple majority vote on July 20, 2003 (two days before the *Guinn* Order expired).[6] Pet. 10. Petitioners contend that Senate Bill 5 would have required a two-thirds vote for passage if not for the *Guinn* Order. *Id.* However, as opined by Legislative Counsel Brenda Erdoes on the floor of the Nevada Assembly before the vote on Senate Bill 5, the bill did not raise revenue, and therefore did not require a two-thirds vote, without regard to the *Guinn* Order.[7] Ms. Erdoes' legal opinion, which she provided as part of her official duties as legal counsel to the Nevada Legislature, and which was an interpretation of Nevada law separate from the Nevada Supreme Court's decisions in the *Guinn* litigation, has never been disputed by any court. In any case, Senate Bill 5 was never enacted. It was sent to the Nevada Senate for approval, but no further action was taken on the bill so it died in the Nevada Senate on July 22, 2003, when the 20th Special Session ended.[8]

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[5] *See supra* notes 3 and 4.

[6] The history of Senate Bill 5 is available at http://www.leg.state.nv.us/20thSpecial/Reports/history.cfm?ID=1232.

[7] Ms. Erdoes opined in response to a question from Assemblyman Beers. Assembly Daily Journal, Twentieth Special Session 2003, The Twenty-Fifth Day, July 19, 2003, *available at* http://www.leg.state.nv.us/20thSpecial/Journal/Assembly/Final/aj025.html.

[8] *See supra* notes 3 and 6.

On July 14, 2003, Petitioners commenced the instant case in the District Court — the day after Senate Bill 6 was passed by the Nevada Assembly upon a simple majority vote (July 13, 2003), and eight days before the 20th Special Session ended (July 22, 2003). Pet. App. 9a. Petitioners brought the instant case seeking declaratory and injunctive relief and nominal damages relating to Respondents' obedience to the *Guinn* Order. *Id.* The District Court found that the *Rooker-Feldman* doctrine prevented the District Court from having subject matter jurisdiction over the claims of the Petitioners who were also parties in the *Guinn* litigation, because the instant case "constitute[d] a direct attack on the [*Guinn*] decision of the Nevada Supreme Court." *Id.* at 12a-13a. For all Petitioners remaining after the application of the *Rooker-Feldman* doctrine, the District Court dismissed the case based upon Petitioners' failing to state a claim upon which relief could be granted, given that Respondents were simply following Nevada law as mandated by the Nevada Supreme Court. *Id.* at 13a-14a. The District Court dismissed the instant case on July 18, 2003. *Id.* at 7a, 14a.

Before the Ninth Circuit could hear Petitioners' appeal of the instant case, the Nevada Legislature enacted Senate Bill 8 with two-thirds votes in both houses, thereby bringing the 20th Special Session to an end. *Id.* at 2a. With the end of the 20th Special Session, the *Guinn* Order expired and Senate Bill 6 died. *Id.* at 3a-4a. The Ninth Circuit found that Petitioners lacked standing to bring their claim for nominal damages and that Petitioners' claims for declaratory and injunctive relief were moot. *Id.* at 3a, 5a.

REASONS FOR DENYING THE PETITION

Petitioners face insurmountable jurisdictional problems, the foremost being that all Petitioners lack standing because all fail the threshold "case or controversy" requirement necessary for standing. Additionally, certain Petitioners and certain claims also fail at the jurisdictional stage based upon

the *Rooker-Feldman* doctrine and, given the events since Petitioners filed the instant case, mootness.

Even if the aforementioned jurisdictional problems did not exist, further features of this case make it an undesirable case for this Court to review. First, the decision below of the Ninth Circuit is an unpublished decision, and even if the decision below had precedential value, it would not create any split of authority. Second, to change the result in this case, this Court would need to depart from its longstanding policy of avoiding the revisiting and overturning of state supreme courts' interpretations of their own state constitutions. Third, there are alternative independent grounds supporting the result in this case — specifically, various forms of immunity applicable to Respondents — which were not reached by the lower courts because of the many threshold problems presented by this case but which nonetheless show that the decisions below reached the right result. Finally, even if we assume, *arguendo*, that the foregoing jurisdictional and other problems did not exist, on the merits, Petitioners have simply brought slightly altered versions of the same claims which this Court declined to hear when certiorari was sought in the *Guinn* case and which still do not merit review.

I. All Petitioners lack standing.

The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In *Lujan*, this Court identified three criteria that Petitioners must satisfy to establish standing. *Id.* at 560. Two of these criteria are most relevant to the instant case. First, "the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations, footnotes and quotations omitted). Second, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a

favorable decision.'" *Id.* at 561. In the instant case, all Petitioners have failed to satisfy these criteria.[9]

A. Petitioners may be categorized as Legislator Petitioners, Voter Petitioners and Taxpayer Petitioners.

The entire group of Petitioners can be divided into three categories such that every petitioner falls into at least one category. First, the category of "Legislator Petitioners" includes those Petitioners who are Legislators. Pet. 8; Pet. App. 9a. They assert claims based upon nullification or dilution of their votes as Legislators. Pet. 8; Pet. App. 9a. Second, the category of "Voter Petitioners" includes those Petitioners who assert claims related to voting. Pet. 8; Pet. App. 9a. Third, the category of "Taxpayer Petitioners" includes those Petitioners who assert claims related to the possibility of paying Nevada taxes enacted with less than a two-thirds vote in each house of the Nevada Legislature. Pet. App. 9a.

B. Legislator Petitioners lack standing.

Legislator Petitioners contend that their votes as Legislators were diluted because the *Guinn* Order required revenue-raising bills during the 20th Special Session to be considered passed on simple majority votes rather than two-thirds votes. Pet. 8, 22. However, the *Guinn* Order applied to all members of both houses equally. Thus, Legislator Petitioners' claim is a claim of an institutional injury.[10]

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[9] The remaining criterion is that "there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (alteration in original). Petitioners may even fail here, as the Nevada Supreme Court, not Respondents, caused the alleged injuries. *Cf. Raines v. Byrd*, 521 U.S. 811, 830 n.11 (1997).

[10] *Raines*, 521 U.S. at 821 ("[A]ppellees have not been singled out for specially unfavorable treatment as opposed to other Members of their

Because they are claiming an institutional injury, Legislator Petitioners' standing is governed by this Court's precedents in *Raines v. Byrd*, 521 U.S. 811 (1997) and *Coleman v. Miller*, 307 U.S. 433 (1939). *Raines*, 521 U.S. at 821. In *Coleman*, 20 of 40 Kansas Senators were found to have standing to assert an institutional injury based upon the Kansas Legislature's enactment of a resolution over the 20 Senators' "no" votes. *Coleman*, 307 U.S. at 438. The resolution was enacted by the Kansas Legislature when the Lieutenant Governor, as presiding officer of the Senate, cast the tie-breaking vote to override the "no" votes of the 20 Senators, and then the lower house of the Kansas Legislature also voted to approve the resolution. *Id.* at 436. As stated by this Court in *Raines*:

> It is obvious, then, that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue *if that legislative action goes into effect (or does not go into effect)*, on the ground that their votes have been completely nullified.

Raines, 521 U.S. at 823 (emphasis added and footnotes omitted). Thus, the 20 Senators had standing because *if* they succeeded in their claim that the Lieutenant Governor should not have been able to vote, *then* the effectiveness of the legislative action would have been reversed.[11] Their cognizable injury in fact was that the bill went into effect over their "no" votes, and the redress available from a

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respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.").

[11] *See also Gutierrez v. Pangelinan*, 276 F.3d 539, 545-46 (9th Cir. 2002); *Campbell v. Clinton*, 203 F.3d 19, 29, 31 (D.C. Cir. 2000) (Randolph, J., concurring); *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C. Cir. 1999).

favorable decision was to cause the resolution not to be effective.[12]

Application of *Coleman*, as clarified by *Raines*, to the facts of the instant case shows that Legislator Petitioners do not have standing to bring their institutional injury claim. First, no legislation went into effect over the "no" votes of one-third of the members of either house of the Nevada Legislature. *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). Hence, there is no cognizable injury. Second, because no legislation went into effect, there is no legislation for this Court to cause *not* to be effective if Legislator Petitioners receive a favorable decision. Hence, there is no redress available.[13] *If* a revenue-raising bill *had gone into effect* despite the requisite number of Legislator Petitioners' "no" votes, *then* the Legislator Petitioners would have had standing to assert their institutional injury pursuant to *Raines* and *Coleman*. But that simply did not happen.[14]

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[12] Petitioners assert that there was no injury for this Court to redress in *Coleman* because the resolution at issue was a resolution in which the Kansas Legislature ratified a proposed amendment to the United States Constitution, and the constitutional amendment never ultimately garnered enough state ratifications to become effective. Pet. 25. However, Petitioners misread *Coleman*. When this Court decided *Coleman*, this Court noted that the ratification of the proposed amendment by an adequate number of states was an ongoing possibility. *Coleman*, 307 U.S. at 452. Thus, the Kansas Legislature's ratification had a live and ongoing significance, and the real and significant remedy this Court could offer the Senators was to cause Kansas's ratification not to be effective.

[13] Respondents note that psychic satisfaction and payment for attorney's fees accrued in maintaining the instant case are inadequate forms of redress to support standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

[14] Legislator Petitioners urge this Court to break from its established jurisprudence regarding institutional injuries to address controversies

The stumbling block for Legislator Petitioners is that, when the instant case was brought in District Court, their claim was not yet ripe because Senate Bill 6 was still mired at an intermediate stage in the legislative process (and then their claim never did ripen because Senate Bill 6 ultimately died in that legislative process).[15] When this case was brought, it

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concerning legislation at intermediate steps in the legislative process. Pet. 25. In support of their position, Petitioners argue that the Kansas Legislature's resolution in *Coleman*, which finalized Kansas's ratification of the amendment to the United States Constitution, was simply one step toward ultimate approval of the amendment. Pet. 25. Petitioners analogize the constitutional amendment ratification process in *Coleman* to the Nevada Legislature's process in enacting bills through passage in two separate houses. *Id.* However, this analogy fails because the Kansas Legislature's resolution was a completed legislative act of the Kansas Legislature while Senate Bill 6 was not a completed act of the Nevada Legislature. Legislative resolutions sometimes do nothing more than state a legislature's official position, with perhaps little or no effect upon the law of the land, but they are still completed legislative acts. Petitioners' analogy would be more appropriate if, instead of challenging Senate Bill 6, they were challenging a one-house resolution adopted by the Nevada Assembly which expressed the position of the Nevada Assembly in an official and final manner. But those are not the facts of this case.

[15] As stated by now-Justice Stevens: "As federal judges we are satisfied that we may not participate in preliminary stages of a State's legislative process." *Dyer v. Blair*, 390 F. Supp. 1287, 1289 (N.D. Ill. 1974) (finding unripe a challenge to the defeat of a resolution by the Illinois House of Representatives because of the House's enforcement of an allegedly unconstitutional requirement of a three-fifths vote for passage, with the court finding a lack of ripeness because the Illinois Senate had not yet acted (and ultimately did not act) on the resolution). *Cf. National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-08 (2003) ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference *until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.*") (emphasis added and quotations and citations omitted). The District Court recognized the

was still possible that Senate Bill 6 could have been approved by both houses of the Nevada Legislature on two-thirds votes. For example, if the conference committee had not let Senate Bill 6 die, but instead had returned the bill with a compromise position reconciling the competing Assembly and Senate versions of the bill, then another vote by each house would have been necessary before the bill could have been enacted. At that point, each house might have approved the compromise bill by a two-thirds vote. This is just one of many possibilities as to how the Nevada Assembly might have had another opportunity to obtain a two-thirds vote on Senate Bill 6. Further, when this case was brought, it was reasonable to believe that Senate Bill 6 might not go into effect — as shown by the fact that it never did. The point of these observations is that, until a legislative process is complete, it is impossible to know what its results will be.[16] So disagreements (such as the one in the instant case) regarding incompletely-processed legislative acts are necessarily abstract, hypothetical and based upon conjecture. They simply are not ripe — and in the instant case, Petitioners' claims never did ripen.

C. Voter Petitioners lack standing.

Voter Petitioners raise two distinct claims. First, Voter Petitioners . proffer the derivative claim that the alleged institutional injury suffered by Legislator Petitioners is also an injury to Voter Petitioners. Pet. 26. With regard to this alleged institutional injury, if Legislator Petitioners have no cognizable injury in fact which can be redressed by a favorable decision, then neither do Voter Petitioners.

As discussed in Part I.B., *supra*, pursuant to the precedent of this Court in *Raines* and *Coleman*, as applied to the facts

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ripeness issue, but disposed of the case otherwise. Pet. App. 14a ("[W]e need not address the substantial issues of immunity and ripeness.").

[16] *Perry v. Del Rio*, 66 S.W.3d 239, 255 (Tex. 2001) ("[P]redictions about the probable course of the legislative process are notoriously unreliable, as anyone remotely familiar with the process well knows.").

of the instant case, Legislator Petitioners could not establish a cognizable injury in fact regarding their claim of an institutional injury, and, in any case, a favorable decision could not redress Legislator Petitioners' alleged institutional injury. As also discussed in Part I.B., *supra*, Legislator Petitioners' claim was not ripe when brought, and never ripened. Because Voter Petitioners' first claim is simply derivative of Legislator Petitioners' claim, the same infirmities cause Voter Petitioners not to have standing to bring their first claim.

Before turning to Voter Petitioners' second claim, Respondents note that even if Legislator Petitioners could establish a cognizable injury in fact regarding an institutional injury which could be redressed by a favorable decision, it does not necessarily follow that Voter Petitioners have standing to bring their derivative claim. The *Guinn* Order applied to all Legislators equally and so affected equally the representation provided to all Nevadans. The *Guinn* Order did not provide that the representation provided to any specific and identifiable Nevadan would be reduced as compared to any other Nevadan. Thus, even if Legislator Petitioners had a viable claim of an institutional injury (which they do not), Voter Petitioners would still need to show that all Nevadans (because Voter Petitioners are not distinguishable) have standing to bring suit on an alleged institutional injury suffered by all Nevada Legislators equally.[17] In fact, there is authority to suggest the

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[17] Although Petitioners cite the D.C. Circuit's decision in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), *Michel* does not address this circumstance even if we assume, *arguendo*, that the *Michel* Court's reasoning still has validity on this point. *See* Part IV.E., *infra* (discussing the fact that *Michel* does not represent the D.C. Circuit's current jurisprudence). In *Michel*, unlike the instant case, the D.C. Circuit was addressing a circumstance in which specific and identifiable constituents (i.e., constituents of representatives from states such as Illinois) were having their representatives' voting power reduced so as to increase the voting power of the delegates of other specific and identifiable

opposite — that such general claims of improper conduct by the government, without particularized injury to the Voter Petitioners, are insufficient to sustain standing.[18]

Voter Petitioners' second claim is that their votes for the Gibbons Initiative, which was the ballot question by which the two-thirds vote requirement for revenue-raising bills was added to the Nevada Constitution, were diluted by the *Guinn* Order. Pet. 5 n.1, 8, 27. Significantly, Voter Petitioners do not claim any problem with the two elections, in 1994 and 1996, in which the Gibbons Initiative was approved as an amendment to the Nevada Constitution.[19] Instead, Voter Petitioners' claim is that they do not agree with the manner in which the two-thirds vote requirement has been interpreted by the Nevada Supreme Court in the *Guinn* decisions. Respondents observe that once the two-thirds vote requirement became part of the Nevada Constitution, it became the law for all Nevadans, not only those who voted for it. Thus, Voter Petitioners' claim is the same as the claim that could be brought by any Nevadan — specifically, the allegation that entities, officers and employees of the State Government are not following the Nevada Constitution as the claimants believe it should be followed. However, a general claim that the government is not following the law, absent some particularized injury to the claimant, does not give the claimant a cognizable injury in fact sufficient to establish standing.[20] Therefore, Voter Petitioners fail to establish standing for their second claim.

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constituents (i.e., constituents of delegates from non-state jurisdictions such as Puerto Rico). *Michel*, 14 F.3d at 626.

[18] *See infra* note 20.

[19] The Nevada Constitution requires that amendments to the Nevada Constitution via initiatives be approved twice. Nev. Const. art. 19, § 2.

[20] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent. An interest shared generally with the public at large in the proper application of the Constitution and laws

D. Taxpayer Petitioners lack standing.

Taxpayer Petitioners participated in the instant case to enjoin the operation of the *Guinn* Order so as to prevent the possibility that Taxpayer Petitioners might be required to pay a tax enacted without a two-thirds vote in each house of the Nevada Legislature. Pet. 9a. However, no tax was enacted without a two-thirds vote in each house of the Nevada Legislature, either at the time the instant case was filed or thereafter. Pet. App. 2a-4a; *Guinn II*, 76 P.3d at 34 (Maupin, J., dissenting). Given these facts, Taxpayer Petitioners' claims were not ripe when the instant case was filed, and never became ripe.[21] In short, Taxpayer Petitioners never suffered a cognizable injury in fact, and there never was anything for a favorable decision to redress.

II. The *Rooker-Feldman* doctrine applies to Legislator Petitioners, but is not necessary to this case.

All Legislator Petitioners were parties to the *Guinn* case at the Nevada Supreme Court. Pet. App. 12a. In the *Guinn* litigation, Legislator Petitioners attacked the Nevada Supreme Court's *Guinn* Order directly. In the instant case, Petitioners, including Legislative Petitioners, attack the *Guinn* Order indirectly by attacking Respondents for obeying the *Guinn* Order. Thus, as the District Court observed, Petitioners in the instant case were, in essence, requesting that the District Court review and overturn the Nevada Supreme Court's decision in *Guinn I*. Pet. App. 12a. Therefore, pursuant to this Court's precedent in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), the District Court recognized that it did not have

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will not do.") (quotations and citations omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 175 (1974).

[21] *Cf. National Park Hospitality Ass'n*, 538 U.S. at 807-08; *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

subject matter jurisdiction over the Legislator Petitioners' claims. Pet. App. 12a.

However, the *Rooker-Feldman* doctrine is not necessary to the result of the instant case. All Petitioners lack standing, in addition to the other infirmities of this case raised by Respondents in the remainder of the instant brief. The *Rooker-Feldman* doctrine does nothing more than present just one more reason why Legislator Petitioners' claims should fail at the jurisdictional level of inquiry. Thus, there is no need for this Court, as proposed by Petitioners (Pet. 10 n.4), to hold this Petition until this Court resolves *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102 (3rd Cir. 2004), *cert. granted* 2004 WL 2058940 (U.S. Oct. 12, 2004) (No. 03-1696).

III. Petitioners' claims for declaratory and injunctive relief are moot.

A. Petitioners' claims for declaratory relief are moot.

Petitioners sought declaratory judgments that the Nevada Assembly's treatment of Senate Bill 6 as passed on a simple majority vote violated the Nevada Constitution and diluted their votes. Pet. App. 9a. However, when a party's requested relief can no longer affect the rights of the parties to the case, or the issues in the case are otherwise no longer live, then the claim for declaratory relief is moot.[22] As correctly noted by the Ninth Circuit below, Petitioners' claims for declaratory

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[22] *Lewis*, 494 U.S. at 477 ("Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (quotations and citations omitted). *See also Arizonans for Official English*, 520 U.S. at 48; *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982); *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

relief are moot because Senate Bill 6 died without being enacted. Pet. App. 2a-3a. Senate Bill 6 will be treated in exactly the same manner without regard to any decision in the instant case — specifically, it will be treated as a bill which was not enacted. Therefore, Petitioners' claims for declaratory relief are moot.

Before leaving this point, Respondents note that, under certain circumstances, a claim for declaratory relief can survive mootness if it is needed as a predicate for monetary relief.[23] In the instant case, Petitioners did seek nominal damages. Pet. 8. However, as the Ninth Circuit correctly noted below, Petitioners lacked standing to bring their claims for damages. Pet. App. 5a. *See also* Parts I.B., I.C. and I.D., *supra*. Further, even if Petitioners had standing, Petitioners' claims for damages should fail based upon Respondents' immunity. *See infra* Part VI. When a claim for damages that was initially brought in a case is not viable, or at some point loses viability, then that claim for damages cannot save from mootness a related claim for declaratory relief that is otherwise moot.[24]

B. Petitioners' claims for injunctive relief are moot.

Petitioners sought to enjoin Respondents from considering Senate Bill 6 or any other revenue-raising bills to be passed or enacted with less than a two-thirds vote in each house of the Nevada Legislature. However, when the issues in a case are no longer live, then a claim for injunctive relief in that case is moot.[25] As correctly noted by the Ninth Circuit below, Petitioners' claims for injunctive relief are moot. Pet. App. 3a. The claims are moot, quite simply, because Senate Bill 6 died and the *Guinn* Order expired without any revenue-raising bill being enacted with less than

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[23] *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

[24] *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (finding claim for declaratory relief moot after claim for damages eliminated).

[25] *See supra* note 22.

a two-thirds vote in each house. Further, now that the *Guinn* Order has expired, Respondents have no duty or authority, and have not even claimed any duty or authority, to treat revenue-raising bills as passed or enacted with less than a two-thirds vote. Therefore, Petitioners' claims for injunctive relief are moot.

C. The exception to mootness for "voluntary cessation" does not apply.

As the Ninth Circuit correctly held, the voluntary cessation exception to mootness does not apply to the instant case. Pet. App. 3a. The voluntary cessation exception exists to ensure "that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."[26] Without this exception, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'"[27] When determining whether a case is rendered moot by "a defendant's *voluntary* conduct," this Court applies the following standard: "'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not *reasonably* be expected to recur.'"[28] In determining what is needed to establish such a reasonable expectation, this Court has explained that "'pleadings must be something more than an ingenious academic exercise in the conceivable.'"[29]

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[26] *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

[27] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000) (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)).

[28] *Friends of the Earth*, 528 U.S. at 189 (emphasis added) (*quoting United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

[29] *Preiser*, 422 U.S. at 403 (*quoting United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973)). *See also City of Erie v. PAP'S A.M.*, 529 U.S. 277, 303 (2000) (Scalia, J., concurring) ("The test for mootness we have applied in voluntary-termination cases is not whether the action originally giving rise to the

In the instant case, Respondents did not voluntarily decide that they would consider revenue-raising bills to be passed and enacted on simple majority votes. That decision was made by the Nevada Supreme Court by the terms of its *Guinn* Order, the issuance of which the Nevada Legislature fought against. Respondents also did not voluntarily decide that they would cease to consider revenue-raising bills to be passed and enacted on simple majority votes. That decision, too, was made by the Nevada Supreme Court by the terms of its *Guinn* Order. Further, there is no possibility that the effectiveness of the *Guinn* Order will recur — that fact is assured by the terms of the *Guinn* Order. As the Ninth Circuit found:

> Neither of the two allegedly harmful actions in this case (i.e., the Nevada Supreme Court writ of mandamus ordering the Legislature to conduct the 20th Special Session under "simple majority rule," and the "passage" of SB 6 itself) may ever be repeated, as they were both directed to specific periods in time that have already passed (i.e., the 20th Special Session, and the period for planning the 2004 budget).

Pet. App. 3a. Finally, with or without the *Guinn* Order, there is no reason to believe that Respondents will ever voluntarily choose to consider revenue-raising bills as passed or enacted on simple majority votes, as they never voluntarily chose to do so in the first place.

Putting aside the issues of the involuntary nature of Respondents' conduct, as well as the final and complete expiration of the *Guinn* Order, it is additionally worth noting that it is highly unlikely that the special circumstances which led to the decision in *Guinn I* would ever recur, much less

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controversy could not *conceivably* reoccur, but whether it is 'absolutely clear that the . . . behavior could not *reasonably be expected to recur.*'") (emphasis added) (*quoting Concentrated Phosphate Export Ass'n,* 393 U.S. at 203).

recur *and then also* result in the issuance of a *Guinn*-like order, especially during the 2005 Legislative Session. Such a recurrence would require the combination of several extraordinary factors. First, the State of Nevada would have to find itself in dire economic conditions as it did in 2003 when the State grappled with the economic losses suffered by the gaming and tourism industries as a result of the historic "9/11" attack on our nation. This factor seems highly unlikely, especially for 2005, as Nevada's state revenues continue to exceed earlier expectations.[30] Second, the Legislature would have to be at an impasse with education as the last item still unfunded. After 2006, it may be impossible for this particular factor to recur. The voters recently passed Question 1 on the Nevada 2004 General Election Ballot which, if passed by the voters again in 2006, will amend the Nevada Constitution to require that education be funded *first*, thereby avoiding forever the circumstances that precipitated the decision in *Guinn I*. Third, the Governor would have to take the unusual step of bringing an action in the Nevada Supreme Court to request the issuance of a writ of mandamus against the Nevada Legislature. Finally, the Nevada Supreme Court would have to take the unusual step of again issuing such a writ of mandamus ordering the Nevada Legislature to proceed on revenue-raising bills under simple majority rule. This factor is especially unlikely to recur as the composition of the Nevada Supreme Court has changed considerably since the *Guinn* decisions. Four of the seven justices who will

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[30] Cy Ryan, *Rainy day fund gets boost from economy*, Las Vegas Sun, December 7, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/sun/2004/dec/07/517944441.html?cy%20ryan%20rainy%20day ("After the Economic Forum last week made its predictions of tax collections for the coming two years, legislative fiscal experts estimated there will be $330 million extra on June 30, 2005, the end of this fiscal year."). *See also* State of Nevada Economic Forum, Forecast of Future State Revenues, December 1, 2004, at p. 7, *available at* http://www.leg.state.nv.us/lcb/fiscal/Economic%20Forum/EF%20Dec%201%202004%20Report.pdf.

serve on the Nevada Supreme Court as of January 1, 2005, appear to disagree with, or at least question, the decisions issued in *Guinn*.[31] Therefore, even in the unlikely event that another case similar to *Guinn* is presented to the Nevada Supreme Court, it would not be reasonable to expect the same decisions.

D. The exception to mootness for "capable of repetition yet evading review" does not apply.

As the Ninth Circuit correctly held, the "capable of repetition yet evading review" exception to the mootness doctrine does not apply to the instant case. Pet. App. 3a. This Court has consistently held that:

> [T]he capable-of-repetition doctrine *applies only in exceptional situations,* where the following *two*

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[31] Justice Maupin, who still serves on the Nevada Supreme Court, dissented in part to the decision in *Guinn I.* Since the *Guinn* decisions, three of the other six justices have been replaced. The new justices, Justice Douglas, Justice Hardesty and Justice Parraguirre, were recently elected to the Court, and each justice has commented on the decision in *Guinn I. See* Don Cox, *Candidates come to dinner: Hopefuls discuss issues at tables of local residents,* Reno-Gazette Journal, October 27, 2004, *available at* http://www.rgj.com/news/stories/html/2004/10/26/83742.php ("Was the Supreme Court correct when it ruled last year to allow the Legislature to pass a tax hike without the two-thirds majority vote required by the constitution? Hardesty: No. I disagreed with the court's handling of the case and the analysis of the decision."); Carri Geer Thevenot, *SUPREME COURT: Challenger holds lead on justice: Poll shows Guinn appointee slightly trailing Las Vegas attorney*, Las Vegas Review-Journal, October 22, 2004, *available at* http://www.reviewjournal.com/lvrj_home/2004/Oct-22-Fri-2004/news/25066004.html ("Douglas has said he thinks the justices acted prematurely with their ruling in Guinn v. Legislature. He said they should have told lawmakers 'to go back to work and not come back until they passed a budget.'"); Erin Neff, *'$1 million race' begins in earnest*, Las Vegas Review-Journal, April 28, 2004, *available at* http://www.parraguirre2004.com/news3.html ("'I may not agree with that decision, and I may not have ruled that way,' Parraguirre said . . .'I wasn't privy to the extensive briefing that took place in that case. I wasn't privy to any of the arguments.'").

> *circumstances* [*are*] *simultaneously present:* (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, *and* (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.

Spencer v. Kemna, 523 U.S. 1, 17 (1998) (emphasis added and quotations and citations omitted). Further, this Court has explained that:

> [This] Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test [described in *Spencer,* above]. . . . Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

Murphy v. Hunt, 455 U.S. 478, 482 (1982) (*quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

In considering these rules and explanations, it is clear that this exception to mootness does not apply because there is not any reasonable expectation that the same allegedly harmful acts will recur involving Petitioners or anyone else. As the Ninth Circuit found, it is impossible for the specific acts at issue in the instant case (e.g., compliance with the *Guinn* Order) ever to be repeated. Pet. App. 3a. Further, as discussed in Part III.C., *supra*, there is not any reasonable expectation that the unique combination of special circumstances which led to *Guinn I* will recur and also result in a future *Guinn*-like order.

IV. The Ninth Circuit's decision below does not create any split of authority.

The decision below of the Ninth Circuit is an unpublished decision, but even if the decision below had precedential value, it would not create any split of authority.

A. There is no conflict with the Seventh Circuit regarding the mootness of claims for declaratory relief.

Petitioners forget a pertinent aspect of the instant case — specifically, their lack of standing to bring their claims for nominal damages — while asserting a false conflict between the Ninth Circuit's decision below and the Seventh Circuit's decision in *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). Pet. 19. Petitioners correctly identify the legal principle at issue, which is that a claim for declaratory relief which would otherwise be moot can remain live if needed as a predicate for a live claim for damages.[32] Pet. 19. The Ninth Circuit has demonstrated its awareness of this legal principle, as exemplified in *Rhodes v. Robinson*, 380 F.3d 1123, 1128 n.8 (9th Cir. 2004). However, in the instant case, the Ninth Circuit correctly found that Petitioners failed to establish standing to bring their claims for nominal damages, so those claims for damages were not live. Pet. App. 4a-5a. *See also* Parts I.B., I.C. and I.D., *supra*. Therefore, because there was no live claim for damages for which Petitioners' claim for declaratory relief was needed, the Ninth Circuit was able to correctly find that the claim for declaratory relief was moot without any conflict with the Seventh Circuit in *Crue*.[33]

B. There is no conflict with the First Circuit regarding the mootness exception for "capable of repetition yet evading review."

Petitioners misread the Ninth Circuit's decision below in asserting a false conflict between the Ninth Circuit's decision below and the First Circuit's decision in *Becker v. Federal Election Comm'n*, 230 F.3d 381 (1st Cir. 2000). Pet. 21. The First Circuit focused on the likelihood of repetition — specifically, the practically certain nature of corporate

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[32] *See Wolff*, 418 U.S. at 555; *Crue v. Aiken*, 370 F.3d 668, 677-78 (7th Cir. 2004).

[33] *See Ashcroft*, 431 U.S. at 172 (finding claim for declaratory relief moot after claim for damages eliminated).

sponsorship of presidential debates in the future — as well as the short length of a presidential election campaign season. *Becker*, 230 F.3d at 389. The Ninth Circuit did not forget about the short length of Nevada legislative sessions. Rather, the Ninth Circuit focused on the fact that Petitioners' alleged injuries concerned the *Guinn* Order, which had permanently expired, so the injuries could not recur. Pet. App. 3a. *See also* Part III.C., *supra*. Not only was the Ninth Circuit correct in finding that Petitioners' alleged injuries could not recur, but even if we assume, *arguendo*, that the Ninth Circuit's factual finding was wrong, the Ninth Circuit was still applying the same test as the First Circuit and simply coming to a different conclusion by applying the same test to different facts. Thus, there is no conflict.

C. There is no conflict with the cases cited by Petitioners regarding the standing of Legislators to bring institutional injury claims.

Petitioners misread or misapply a number of cases throughout their discussion of Legislator Petitioners' standing (*see* Pet. 22-26), and Respondents address the most significant of these mistakes here. First, as already discussed in Part I.B., *supra*, this Court's decisions in *Raines* and *Coleman* require that Legislator Petitioners be found *not* to have standing to bring their claim of an institutional injury because Legislator Petitioners sought to *defeat* a legislative measure and, in fact, that legislative measure *did not go into effect*. Thus, the Ninth Circuit correctly followed *Raines* and *Coleman* in finding Legislator Petitioners lacked standing. Therefore, there is no conflict.[34]

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[34] Here, Petitioners also incorrectly assert a conflict with the Ninth Circuit's own precedent in *Gutierrez*, 276 F.3d at 545-46. In *Gutierrez*, the Ninth Circuit correctly found that the Governor of Guam had standing to bring his institutional injury claim because (1) his "vote" alone (i.e., approving or vetoing legislation) should have been enough to approve the legislation in question, and (2) the legislation he sought to approve did *not* go into effect despite what he alleged was his "vote" of approval. *Id.*

Next, Petitioners invoke *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997), *Conway v. Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997), and *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), for the proposition that it is possible for a due process violation to occur if a state legislature does not follow its own procedures. Pet. 23. These are the cases regarding which Petitioners mistakenly assert that there are conflicts involving the Fourth and Ninth Circuits and the District of Vermont. Pet. 25. However, none of these cases involve claims of an institutional injury. Further, in none of these cases was standing even an issue, as the plaintiffs in these cases (unlike the Petitioners in the instant case) alleged concrete and particularized injuries sufficient to support standing.[35] Therefore, none of these cases conflict with the Ninth Circuit's decision below regarding Legislator Petitioners' standing to bring claims of institutional injuries.

Petitioners also misread this Court's dicta in footnote 7 of *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986). In footnote 7, this Court hypothesized that *if* state law had provided that the school board in question could only take its action (i.e., decide to forgo the appeal in question) by unanimous consent, but the board had put its action into effect over the dissent of one member, *then* the dissenter would have standing under *Coleman*. Such reasoning is consistent with the Ninth Circuit's application of *Raines* and *Coleman* in the decision below because, in accordance with this hypothetical, the dissenter's vote should have been enough to defeat the action but the action nonetheless was *put into effect*, thereby fulfilling the requirements for standing to challenge the institutional injury. Therefore, there is no conflict.

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[35] *Rea v. Matteucci*, 121 F.3d 483, 484 (9th Cir. 1997); *Conway v. Searles*, 954 F. Supp. 756, 759 (D. Vt. 1997); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1154 (4th Cir. 1991).

D. There is no conflict with the First, Fifth, Eighth and D.C. Circuits regarding standing for individual voters to bring vote dilution claims.

Petitioners misread the Ninth Circuit's decision below in asserting a false conflict with this Court and with the First, Fifth, Eighth and D.C. Circuits in *Miller v. Johnson*, 515 U.S. 900 (1995), *Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395 (8th Cir. 1985), *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993) (*citing United States v. AVX Corp.*, 962 F.2d 108, 113-14) (1st Cir. 1992), *Daughtrey v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978), *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976), and *Locklear v. North Carolina State Bd. of Elections*, 514 F.2d 1152 (4th Cir. 1975).[36] Pet. 26. Petitioners mistakenly assert that the Ninth Circuit implicitly adopted the following test with regard to standing for individual voters bringing vote dilution claims: "Vote dilution or outright vote nullification claims by individual voters could only be sustained if the candidate opposed (or supported) by the disenfranchised voters was actually elected (or defeated)." Pet. 25. The Ninth Circuit adopted no such test and never applied any such test to individual voters. Instead, with regard to determining the standing of the Legislator Petitioners to bring their claim of an institutional injury, the Ninth Circuit quoted and applied this Court's decision in *Raines*, as follows: "[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Pet. App. 5a (*quoting Raines*, 521 U.S. at 823). Although Legislator Petitioners styled their claim as a claim for dilution of their votes as Legislators, the Ninth Circuit implicitly and correctly treated this claim as a claim of an institutional injury which was subject to the standing requirements of this

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[36] Respondents address *Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997), in Part IV.E., *infra*.

Court's decisions in *Raines* and *Coleman*. Pet. App. 5a. *See also* Part I.B., *supra*. With regard to the remainder of the alleged "vote dilution" claims, as brought by the Voter Petitioners, these claims also were not actual vote dilution claims. Instead, Voter Petitioners asserted a derivative institutional injury claim and a generalized claim that the government was not following the law, neither of which Voter Petitioners had standing to bring. *See* Part I.C., *supra*. Thus, as the Ninth Circuit did not adopt or apply the test Petitioners attribute to the Ninth Circuit, there is no conflict with this Court and the First, Fifth, Eighth and D.C. Circuits.

E. There is no conflict with the D.C. Circuit's *current* jurisprudence regarding standing.

Petitioners rely on the D.C. Circuit's decisions in *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), and *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997), for a number of propositions regarding standing to maintain claims of institutional injuries. Pet. 23, 26, 29. However, these opinions are not the current jurisprudence of the D.C. Circuit on these issues. After this Court's decision in *Raines*, which specifically identified *Michel* and then did not follow the reasoning in *Michel* (*see Raines*, 521 U.S. at 816), the D.C. Circuit changed its approach to standing for claims of institutional injuries, as exemplified by the post-*Raines* D.C. Circuit case of *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).[37] Thus, there is no conflict.

V. To alter the result in this case, this Court would need to revisit and overturn the Nevada Supreme Court's interpretation of its own state constitution.

In deciding the *Guinn* cases, the Nevada Supreme Court determined that the facts and circumstances present during the 20th Special Session produced an "irreconcilable conflict" between certain provisions of the Nevada

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[37] *See also Chenoweth*, 181 F.3d at 116.

Constitution, and therefore interpreted one of these provisions (i.e., funding education) to have precedence over another of these provisions (i.e., a two-thirds vote to enact revenue-raising bills). *Guinn I*, 71 P.3d at 1276; *Guinn II*, 76 P.3d at 25. In accordance with this interpretation, the Nevada Supreme Court then ordered the Nevada Legislature to proceed under simple majority rule during the 20th Special Session. *Guinn I*, 71 P.3d at 1276. Thus, the Nevada Supreme Court's *Guinn* decisions and the resultant *Guinn* Order were based solely and completely upon the Nevada Supreme Court's interpretation of the Nevada Constitution.

In the instant case, Petitioners' contentions boil down to nothing more than assertions that Respondents complied with, and intended to continue to comply with, the *Guinn* Order and the provisions of the Nevada Constitution as interpreted by the Nevada Supreme Court in *Guinn*.[38] Thus, unless this Court revisits and overturns the Nevada Supreme Court's interpretation of the Nevada Constitution in *Guinn*, Petitioners have no case. In dismissing the instant case, the District Court noted this fact when it stated that "[u]nless the Nevada Supreme Court's decision in *Guinn v. Legislature* is set aside, the defendants herein were in compliance with the law as mandated by the highest court of the State of Nevada." Pet. App. 14a.

This Court has long followed a policy of avoiding the revisiting and overturning of a state supreme court's interpretation of its own state constitution.[39] If this Court

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[38] Of course, Petitioners would contend that the Nevada Supreme Court's interpretation of the Nevada Constitution in *Guinn* was incorrect. But, as previously stated, Legislator Petitioners have already challenged and appealed *Guinn* to the fullest extent possible, and the *Guinn* decisions were never found to be incorrect. *Angle*, 124 S. Ct. at 1662-63; *Guinn II*, 76 P.3d at 33.

[39] *North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979) ("[T]his Court must accept whatever construction of a state constitution is placed upon it by the highest court of the State."). *See also Arizona v. Evans*, 514 U.S. 1, 9 (1995); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207,

simply maintains its longstanding policy, then all claims of all Petitioners fail.

VI. Alternative independent grounds — specifically, immunity — support the result in this case.

In addition to the foregoing, the District Court and the Ninth Circuit could have reached the same result — specifically, a result favorable to Respondents — by considering the immunity of the various Respondents.[40] This is especially relevant with regard to Petitioners' claims for damages pursuant to 42 U.S.C. § 1983 (2003).

First, as Respondents Nevada Legislature, Nevada Assembly and Nevada Senate are institutional arms of the State of Nevada, all are immune from Petitioners' suit pursuant to the Eleventh Amendment to the United States Constitution.[41] Further, Respondents Hon. Richard Perkins, Speaker of the Nevada Assembly, and Hon. Lorraine Hunt, Lieutenant Governor and President of the Senate, as officers of the State being sued in their official capacities, also enjoy a degree of Eleventh Amendment immunity.[42]

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226 n.9 (1980); *Williams v. Eggleston*, 170 U.S. 304, 310-11 (1898); *Nesmith v. Sheldon*, 48 U.S. 812, 818 (1849). *Cf. Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. This proposition, fundamental to our system of federalism, *is applicable to procedural as well as substantive rules*.") (emphasis added and citations omitted).

[40] The District Court recognized the immunity issue, but disposed of the case otherwise. Pet. App. 14a ("[W]e need not address the substantial issues of immunity and ripeness.").

[41] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62 (1989); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); Nev. Rev. Stat. 41.031(3) (2003) (providing that Nevada does not waive its Eleventh Amendment immunity).

[42] *Arizonans for Official English*, 520 U.S. at 69 n.24 ("State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983."). Additionally, Respondent Perkins, an Assemblyman as well as Speaker of the Nevada Assembly, enjoys absolute immunity from suit brought under 42 U.S.C. § 1983 while acting

Second, Respondents Hunt and Perkins, to the extent not covered by the Eleventh Amendment immunity discussed above, and Respondents Jacqueline Sneddon, Diane Keetch, Brenda Erdoes and Claire Clift, who are all employees of the Nevada Legislature being sued in their official capacities, raised in the District Court and continue to maintain the affirmative defense that Respondents acted based upon a good faith belief that their actions were lawful.[43] This affirmative defense is a type of qualified immunity, applicable to the officers and employees of the Nevada Legislature in the instant case because they do not exercise broad independence of judgment with respect to performing the official duties concerning which Petitioners complain — specifically, the treatment of a bill as passed or defeated upon a given vote.[44]

VII. On the merits, Petitioners bring only slightly altered versions of the same claims which this Court has already declined to hear in *Guinn* and which still do not merit review.

In petitioning this Court for a writ of certiorari in the instant case, Petitioners have brought claims which in substance are the same claims Legislator Petitioners brought to this Court in the appeal of the *Guinn* case and which this Court declined to hear. *Angle*, 124 S. Ct. at 1662-63. In

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in his capacity as a State Legislator. *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 732-34 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 377-79 (1951).

[43] *Cf. Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("[W]e have held, on the basis of [c]ommon-law tradition . . . and strong public-policy reasons, that certain categories of executive officers should be allowed qualified immunity from liability for acts done on the basis of an objectively reasonable belief that those acts were lawful.") (quotations and citations omitted); *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978); *Wood v. Strickland*, 420 U.S. 308, 320-22 (1975); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Morales v. Vega*, 483 F. Supp. 1057, 1060 (D.P.R. 1979).

[44] *See supra* note 43.

Guinn, the Legislator Petitioners claimed that the Nevada Supreme Court had committed various constitutional violations in its issuance of the *Guinn* Order. In the instant case, Petitioners claim that Respondents have committed these violations by following the *Guinn* Order. Pet. App. 14a. At their core, they are the same claims, even including the nonjusticiable political questions arising from the alleged violations of the Guarantee Clause of Article IV of the United States Constitution. Pet. 8, 12. These claims did not merit review then, and still do not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: December 14, 2004.

(3)

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No. 04-542

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*,

Petitioners,

v.

LEGISLATURE OF THE STATE OF NEVADA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Seeking to dissuade this Court from granting the petition for certiorari, the Legislative Respondents[1] raise a handful of immunity and jurisdictional claims that they either 1) failed to raise below; or 2) raised and lost, and then failed to preserve here by way of a cross-petition. Respondents' immunity claims have been waived by not being raised or preserved below. As for their jurisdictional contentions, the Ninth Circuit below reached the merits of one of petitioners' claims, necessarily rejecting the jurisdictional problems now erroneously asserted by the Legislative Respondents; this Court should reject those contentions as well, as they are without merit and nothing new has transpired that would undermine the jurisdiction already exercised by the Ninth Circuit or that Petitioners seek to invoke in this Court.

I. Respondents' Standing Arguments Are Misplaced.

First and principally, Respondents assert for the first time that *none* of Petitioners had standing to press their constitutional claims below. All do, as this Court's precedents make amply clear.

A. *Coleman* Establishes Standing for Legislators "Whose Votes Would Have Been Sufficient To Defeat" a Bill Absent Unlawful Vote Dilution.

Respondents somehow find support in *Raines* v. *Byrd*, 521 U.S. 811 (1997), for their contention, raised for the first

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[1] Petitioners note that only certain respondents—the Legislature of the State of Nevada; the Nevada Senate; the Nevada Assembly: President of the Senate Lorraine T. Hunt; Speaker of the Assembly Richard D Perkins; Jacqueline Sneddon, Chief Clerk of the Nevada Assembly; Diane Keetch, Assistant Chief Clerk of the Nevada Assembly; Brenda Erdoes, Legislative Counsel of the Nevada Legislature; and Claire J. Clift, Secretary of the Nevada Senate—filed an opposition to the petition for a writ of certiorari. The Executive Branch Respondents chose not to file brief in opposition to the petition. Nevertheless, for simplicity, we refer to the Legislative Respondents simply as "Respondents" herein.

time here, that the Legislator Petitioners did not have standing to pursue their vote dilution claims. The holding of *Raines*, of course, was merely that a group of legislators too small in number to control a legislative outcome does not have standing to challenge the Line Item Veto Act because it was not sufficient in number to affect the outcome of any legislative action under the Act. *Id.*, at 824. The number of legislators who were plaintiffs in *Raines*—4 United States Senators and 2 members of the United States House of Representatives—was woefully short of the number required to pass (or defeat) legislative action in either house.[2] *Id.*, at 814.

In contrast, Petitioners here include a sufficient number of legislators from each house of the Nevada Legislature to prevent adoption of tax-increase bills under the two-thirds vote requirement of the Nevada Constitution. The Nevada Assembly has 42 members, 28 of whom must vote in the affirmative in order on any bill raising taxes in order to meet the constitutional requirement. The 15 Petitioners who are members of the Nevada Assembly are thus sufficient to block tax-increase bills.[3] Similarly, the Nevada Senate is

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[2] *Campbell* v. *Clinton*, 203 F.3d 19 (CADC 2000), also relied upon by Respondents, is inapposite for the same reason. There, 31 members of the 435-member House of Representatives were held *not* to have standing to challenge the exercise of the Presidents' war powers.

[3] Five of the Assembly Petitioners will no longer be members of the Assembly when the Nevada Legislature reconvenes in February 2005: One, Bob Beers, was elected to the Nevada Senate on November 2, 2004; two retired (Walter Andonov and David Brown); and two were defeated in the November election (Donald Gustavson and Ronald Knecht). The November 2004 election does not effect these Petitioners' legal claim for nominal damages resulting from unconstitutional action that occurred during the 2003 legislative session, of course, and Petitioners anticipate that at least five of the new members of the Assembly would join this litigation on any remand to press the equitable claims, once the new legislative session convenes.

comprised of 21 members, so 8 votes are required to defeat tax-increase bills. The 9 Petitioners who are members of the Senate are thus sufficient in number to defeat any tax-increase bill.[4] This Court's holding in *Coleman* v. *Miller*, 307 U.S. 433 (1939), which was re-affirmed (albeit distinguished) in *Raines*, fully supports Petitioners' standing.

Respondents argue instead that, in *Raines*, this Court essentially read *Coleman* as establishing that legislator standing requires not just a sufficient number of legislators to adopt (or defeat) legislation, but also that the "legislative action goes into effect." BIO at 8 (quoting *Raines*, 521 U.S., at 823). Respondents' argument is not based on the holding, or even the *dicta*, from *Raines*, but rather on their own misconstruction of an offhand descriptive phrase in *Raines* regarding *Coleman* that had nothing to do with the holding in either case.

The "legislative action" in *Coleman* to which *Raines* was referring was the action by the Kansas Senate voting in favor of a federal constitutional amendment over the negative vote of 20 of the Senate's 40 members. The "action" was given effect and forwarded to the Kansas House of Representatives for further consideration (and ultimate ratification) because of a tie-breaking vote cast by the Kansas Lieutenant Governor, presiding over the Senate. The Senators had standing because, as this Court recognized in *Raines*:

> [T]he twenty senators were not only qualified to vote on the question of ratification but *their votes*, if the Lieutenant Governor were excluded as not being a

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[4] One of the Senate Petitioners, Ann O'Connell, was defeated in the Nevada primary election in September 2004, but one of the Assembly Petitioners, Bob Beers, was elected to the Senate in the November general election. The number of plaintiffs/petitioners in this case therefore remains sufficient to defeat tax-increase legislation.

> part of the legislature for that purpose, *would have been decisive in defeating the ratifying resolution.*

Raines, 521 U.S., at 823 (quoting *Coleman*, 307 U.S., at 441, emphasis added in *Raines*). Subsequent passage by the Kansas House of Representatives was not a pre-requisite to the Senators' standing, but was merely mentioned parenthetically by the *Coleman* Court as a fact of subsequent history. The vote dilution suffered by the Kansas Senators was complete once the ratification resolution was deemed "passed" by the Senate itself, just as the vote dilution suffered by the Assembly Petitioners here was complete once the Assembly deemed SB6 (and later SB5)[5] as "passed" without the requisite two-thirds vote. In both cases, the legislators suffered harm to their constitutional voting rights sufficient to confer on them standing to challenge the unconstitutional legislative actions already taken, and in this case to seek injunctive and declaratory relief against the likely repetition of such actions in the future as well. Further action by the Kansas House of Representatives would have afforded the Kansas Senators the additional *remedy* of recalling the State's ratification had the Senators been correct on the merits of their claim (and the further remedy of invalidating the federal Child Labor Amendment itself had it passed with the marginal vote of Kansas), just as

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[5] Respondents' contention that SB5, which increased the business license tax from $25 to $125, was not a tax increase subject to the two-thirds requirement of the Nevada Constitution because taxes were not increased overall and because it merely amended the tax increase already imposed by SB6, is nonsensical. *See* BIO at 4 and n.7. The two-thirds vote requirement contained in the Nevada Constitution applies to every "bill or joint resolution which creates, generates, or increases *any* public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." Nev. Const. Art. 4, § 18(2). The increase in the business license "fee" thus subjected the bill to the two-thirds vote requirement, even if other fees and taxes in the bill were reduced.

subsequent approval of the *bill* by the Nevada Senate would have given the Assembly Petitioners the additional *remedy* of recalling the approved *Act* from the Governor (and the further remedy of invalidating the *statute* itself had the Act been signed by the Nevada Governor). But again, in neither case is the subsequent history a prerequisite to Article III standing.

Respondents essentially concede standing for the Legislator Plaintiffs in footnote 12, where they acknowledge that this Court in *Coleman* "noted that the ratification of the proposed amendment by an adequate number of states was an ongoing possibility." BIO at 9 n.12. So too here. At the time this case was filed, adoption of SB6 "was an ongoing possibility," and therefore the circumstances of this case with respect to legislator standing is no different than the circumstances that existed in *Coleman*, in which this Court recognized legislator standing.[6]

B. The Voter Petitioners Likewise Have Standing.

Respondents' principal ground for asserting that the Voter Petitioners do not have standing is that the Legislator Petitioners, from whom the Voter Petitioners' claims are derived, did not have standing. That contention fails for the reasons stated in Part I.A above.[7]

Respondents' second argument fares no better. Respondents' claim is essentially that the Voter Petitioners

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[6] The termination of the possibility of the adoption of SB6 would raise mootness issues, not destroy the Article III standing that already existed. For the reasons described in Part II below, however, the fact that SB6 could no longer be adopted would not moot the legal damages claim, and the equitable claims remain viable with respect to the ongoing likelihood of future unconstitutional tax votes.

[7] Respondents' contention, BIO at 22, that Petitioners' supposed lack of standing eliminates the split with the Seventh Circuit's decision in *Crue* v. *Aiken*, 370 F.3d 668 (CA7 2004), fails for the same reason.

do not have a particularized harm because the Nevada Legislature's failure to comply with the two-third vote requirement effected all Nevada voters equally, but the opposite is true. Voters who favored tax increases had their representation enhanced beyond that afforded by the Nevada Constitution, while voters who opposed tax increases had their representation diluted. That gives the class of voters who oppose tax increases a particularized harm sufficient to confer standing. *See Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994).[8] Similarly, voters who voted in favor of the successful Gibbons tax initiative had their votes effectively nullified, while voters who opposed the initiative had their votes given dispositive weight. Again, the voters in the former camp had a sufficiently particularized injury to support standing.[9]

C. Respondents' Contention That the Taxpayer Petitioners Lack Standing is Really a Ripeness Claim.

Finally, Respondents contend that because SB6 never became law, the taxpayer petitioners "never suffered a cognizable injury in fact" and therefore did not have standing

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[8] Respondents' attempt to distinguish *Michel* is unavailing. While the voter plaintiffs in *Michel* were Illinois residents of Representative Michel, the unlawful vote dilution they claimed was shared by every voter in every congressional district in the United States.

[9] The Voter Petitioners were not parties in the *Guinn* state court litigation, so their claims are clearly not barred by the *Rooker-Feldman* doctrine, as Respondents contend. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994). Nor does *Rooker-Feldman* bar the claims of the Legislator Petitioners, which directly challenge only unconstitutional actions taken by the state legislature, not the decision by the Nevada Supreme Court in *Guinn* which supposedly "authorized" them without ever considering the federal claims pressed here. *See Nelson v. Murphy*, 44 F.3d 497, 503 (7th Cir. 1995) ("Plaintiffs avoid this [*Rooker-Feldman*] rule, however, because they challenge the alteration of their passes independently of the courts' approval of that alteration").

to press their claims. BIO, at 14. Respondents' contention is one of ripeness, not standing; the relevant issue is not whether *these* particular taxpayers could challenge an unlawful tax imposed upon them as a deprivation of their property without due process—they clearly could—but whether the proposed tax was sufficiently imminent to support their claim for declaratory relief.[10] Although SB6 was "passed" by the Assembly only 3 days after the Nevada Supreme Court's decision in *Guinn*, and was scheduled for a vote in the Senate the very day this lawsuit was filed, Petitioners conceded before the Ninth Circuit below that the Taxpayer Plaintiffs' legal challenge to the anticipated tax was not ripe. Ninth Circuit Reply Br. at 12 n.9. Nevertheless, the taxpayer petitioners are also voters, so their claims of unlawful vote dilution were ripe as soon as the Assembly deemed a tax-increase bill as "passed" without the requisite two-thirds vote.

II. Petitioners' Claims are not Moot.

Petitioners' requests for declaratory and injunctive relief are also not moot. Petitioners sought from the district court a declaration that violations of the 2/3 vote provision of the Nevada Constitution unconstitutionally dilute their votes (for the Legislator Plaintiffs) or the votes of their representatives (for the Non-Legislator Plaintiffs), in violation of the Fourteenth Amendment, and also deprive them of the ability to define the structural provisions of their own constitution, in violation of the Republican Guarantee clause. Those violations have already occurred and, as Respondents' *amici* NSEA candidly admitted before the Nevada Supreme Court, the conditions that led to them are likely to recur every

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[10] Petitioners conceded before the Ninth Circuit that the Taxpayer Plaintiffs' claim for nominal damages was not ripe, but continued to press the claims for declaratory and injunctive relief. Ninth Circuit Reply Br. at 12 n.9.

legislative session. Indeed, the unlawful conduct of the Nevada Assembly in deeming SB6 and SB5 as passed without the requisite 2/3 vote "was merely a sample of what might be repeated elsewhere if not prohibited." *United Brotherhood of Carpenters & Joiners v. NLRB*, 341 U.S. 707, 715 (1951).[11] This Court rejected a claim of mootness under such circumstances in *United Brotherhood*; it should not entertain it now as a barrier to granting the petition for certiorari.

Respondents' contention to the contrary is based in part on the fact that Plaintiffs in their complaint sought to enjoin further consideration of SB6 (the only bill which at that time had been passed in violation of the 2/3 vote provision), and that bill died with the 2003 legislative sessions. But Respondents omit a critical fact from their argument: In response to a request from Plaintiffs' counsel during oral argument before the en banc district court on July 16, 2003, to expand the requested relief to cover all tax bills, the district court expressly amended its TRO to include all bills passed by the Legislature without the 2/3 vote required by the Nevada Constitution. Pet. App. 17a. This action thus covers all attempts by the Legislature to pass tax increases without the requisite 2/3 vote—those that twice already occurred and those that are likely to occur during the upcoming legislative session.

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[11] Beyond Nevada, the precedent that was set by the State Assembly here is being closely watched in other states, at least 15 of which have supermajority requirements for tax increases similar to the Nevada provision at issue here. *See, e.g.*, Az. Const. Art. IX § 22; Cal. Const. Art. XIIIA, § 3; Ore. Const. Art. IV, § 25. Jack O'Connell, the California Superintendent of Education held a news conference last July, for example, announcing in the midst of that state's own budget difficulties that he would be bringing suit to challenge California's supermajority requirement. *See* Alexa H. Bluth, "Court's help eyed in budget impasse," Sacramento Bee (July 17, 2003).

Respondents further contend that Petitioners' equitable claims are moot because the Nevada Supreme Court's mandate in *Guinn* v. *Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub nom., Angle v. Guinn*, 124 S.Ct. 1662 (March 22, 2004), which "authorized" the unconstitutional vote dilution, was good only for the 20th Special Session of the Legislature, now concluded. While novel, the contention is without merit. The Nevada Supreme Court in *Guinn* purported to interpret the Nevada Constitution so as to nullify the two-thirds vote requirement. Respondents have cited no authority, and Petitioners are unaware of any, that supports their proposition of short-term constitutional interpretation. Moreover, as Petitioners noted in their petition, Senator Dina Titus, a member of Respondent Nevada State Senate, certainly has a different view: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling" in *Guinn*. Steve Kanighe, *Landmark Ruling Likely to Affect Future Sessions*, Las Vegas Sun, July 12, 2003 at 1 (available at http://www.lasvegassun.com/sunbin/stories/sun/2003/jul/12/515333226.html).

III. Respondent Waived Any Immunity Defenses by Failing to Raise or Preserve Them.

Respondents also contend that they enjoy Eleventh Amendment immunity, absolute immunity, or both. Such immunity can be waived, and Respondents' failure to raise or preserve the immunity defenses below amounts to a waiver of those defenses. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 241 (1985). A litigant cannot pursue his claims to success in one court and then seek to insulate that success from further review by a claim of immunity.

IV. *Guinn* Does Not Preclude Certiorari Here.

Finally, Respondents appeal to this Court's general and long-standing policy of "avoiding the revisiting and overturning of a state supreme court's interpretation of its own state constitution." BIO at 27. But the question presented here is not whether that policy should be reversed, but rather whether the egregious disregard of the Nevada Constitution that occurred in this case presents one of the rare exceptions to that policy. This Court's denial of certiorari in the *Guinn* case was not a ruling on the merits of that question, of course (or on any question, for that matter). The federal constitution guarantees to the people of each state certain rights that can no more be infringed by government actions that are "authorized" by clever constitutional interpretations by the state courts than by those that do not have that judicial cover. *See Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000).

CONCLUSION

For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

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